

# WATSON FARLEY & WILLIAMS

## BRIEFING

# KEY CHANGES IN JCT DESIGN & BUILD CONTRACT

DECEMBER 2016

- NEW EDITION OF THE JCT DESIGN AND BUILD CONTRACT PUBLISHED
- UPDATE MAKES CHANGES AND ADDITIONS TO CARRYING OUT AND CONTROL OF WORKS, AND PAYMENT SECTIONS



The Joint Contracts Tribunal (“JCT”) has recently published the 2016 edition of the Design and Build Contract (“JCT DAB 2016”), updating it from the 2011 edition. The construction market is fast moving and the standard form contracts used, as well as the law, must continually evolve to keep pace. Any updates to the JCT Design and Build (“JCT DAB”) contract, one of the most widely used, are therefore greeted with great interest.

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“THE CONSTRUCTION MARKET IS FAST MOVING AND THE STANDARD FORM CONTRACTS USED, AS WELL AS THE LAW, MUST CONTINUALLY EVOLVE TO KEEP PACE”

The previous iteration of the JCT DAB was issued by the JCT in September 2011 and the new edition has been updated to take into account, among other things, the Construction (Design and Management) Regulations 2015 (“CDM”) and the Public Contracts Regulations 2015. The JCT DAB 2016 has also sought to simplify and clarify the payment regime that has been the source of much confusion and, as a consequence, many disputes, between Employers, Contractors and Subcontractors.

This briefing is intended to give an overview of the most important changes that parties will need to take note of before signing up to a project using the JCT DAB 2016.

### Section 2: Carrying out of the Works

If there is a discrepancy or divergence not only within the Contractor's Proposals but also between the Contractor's Proposals and any other Contractor's Design documents, the Contractor must now notify the Employer. As discrepancies and divergences in project documentation can often be the subject of dispute between the parties, any change that allows for an increase in transparency as to the potential for

a divergence is to be welcomed. However, in keeping with the other changes introduced in the JCT DAB 2016, this is not a revolutionary change and simply makes express the general principle that each party is responsible for discrepancies and divergences in and in between the documents for which it is responsible.

### Section 3: Control of the Works

The JCT DAB 2016 edition now makes the appointment of a full-time, and competent, Site Manager obligatory, whereas in previous editions this had to be expressly provided for in the Contract Particulars. The Site Manager acts as the Contractor's agent for the purpose of receiving instructions and directions (clause 3.2). Although it is the contractor's obligation to appoint the Site Manager, this appointment will still be subject to the approval of the Employer.

Under the JCT DAB 2016, where a Contractor notifies the Employer that an Instruction may infringe a patent right, the Contractor is not required to comply until the Employer has confirmed the Instruction (clause 3.6.2). Further, the JCT DAB 2016 provides that if the Employer has given an Instruction orally, it may confirm this Instruction in writing prior to or within seven days of the Contractor's confirmation of that Instruction. In these circumstances, the Employer's written notice takes effect from the date of that notice, which may be after the Contractor's confirmation. The practical consequence of this change is that an oral instruction may in fact override the Contractor's written confirmation if given within the specified period (clause 3.7.2).

### Section 4: Payment

Perhaps the most important changes to understand in the new form contract are those relating to the notoriously opaque payment provisions. As regular readers of our briefings will be aware (see, in particular, our notes on *Balfour Beatty Regional Construction Ltd v Grove Developments Ltd* (2016) and the Payment regime in JCT contracts), an understanding of the payment provisions, particularly in relation to the submission of Payment and Payless notices, is vital to both Employer and Contractor. The changes implemented in the JCT DAB 2016 are hardly revolutionary but, as mentioned above, are intended to simplify and bring clarity to the payment regime.

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“THE CHANGES THAT HAVE BEEN INTRODUCED IN THE JCT DAB 2016 ARE INTENDED TO BE IN LINE WITH THE GOVERNMENT'S FAIR PAYMENT CAMPAIGN, WHICH IS DESIGNED TO IMPROVE PAYMENT PRACTICES IN THE CONSTRUCTION INDUSTRY”

The changes that have been introduced in the JCT DAB 2016 are intended to be in line with the Government's Fair Payment Campaign, which is designed to improve payment practices in the construction industry.

The key change is the imposition of Interim Valuation Dates, which apply to subcontracts and also sub-subcontracts (clauses 4.72 and 4.73). The introduction of these dates will mean that, if unamended, the JCT DAB 2016 will provide for payment to be made along the contractual chain within 30 days. Clause 4.7.3 of the JCT DAB 2016 provides that the Contractor must make an Interim Payment Application before each Interim Valuation date, with the payment due date being seven days after the applicable Interim Valuation Date.

Another change that will have practical consequences is an amendment to the monthly payment cycle. Under the previous edition of the JCT DAB, the due dates applicable to payments after practical completion were on a two-month cycle. The JCT DAB 2016 provides that the payment cycle will revert to a monthly cycle up until the due date of final payment (clause 4.7.2). The last date for payment of the final

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## “A NEW PROCEDURE HAS BEEN INTRODUCED FOR THE PROMPT ASSESSMENT OF LOSS AND EXPENSE”

payment is now the same as the last date for payment of each interim payment, i.e. 14 days from the due date (clause 4.9.1).

A new procedure has been introduced for the prompt assessment of Loss and Expense, again in an attempt to follow the Fair Payment principles referred to above, and is intended to promote prompt assessment of Loss and Expense Claims. The definition of Relevant Matters remains the same as the previous edition of the JCT DAB and the Contractor may claim for loss and expense incurred as a result of any deferment of possession or because the regular progress of the Works has been materially affected by a Relevant Matter.

However, the JCT DAB 2016 provides that the Contractor must:

1. notify the Employer of the likely effect on progress or the likely nature and extent of any loss and expense as soon as it becomes reasonably apparent to the Contractor;
2. provide at the same time, or as soon as reasonably practicable, an initial assessment of the loss and expense incurred and any further amounts likely to be incurred, together with such information as is reasonably necessary to enable the Employer to ascertain this amount; and
3. provide monthly updates until all information that is reasonably necessary to allow the Employer to finally ascertain the total amount of the loss and expense incurred has been supplied (clause 4.20).

The Contract Administrator must then assess the Contractor's claim within 28 days and, after receipt of additional information from the Contractor, must respond within 14 days.

### Section 8: Termination

A small change in the JCT DAB 2016 allows either party to terminate the Contractor's employment, following a period of suspension, not only for loss or damage to the Works but also for damage arising from any risk covered by the Works Insurance Policy or an Excepted Risk (clause 8.11.1.3).

In line with the Public Contracts Regulations 2015, referred to at the beginning of this briefing, either party can terminate in a situation where the Works have been suspended by the exercise of a statutory power by any Local or Public Authority (clause 8.11.5). This will apply only in circumstances where this suspension has not been caused by the default of the Contractor.

### Commentary

As with previous editions, there is no amendment to the JCT standard form that considers the common practice of requiring the Contractor to assume single point responsibility for both the design and the construction of a development. In practice, the standard drafting has been amended to reflect the Contractor's responsibility for the Employer's Requirements in return for the Employer agreeing to novate appointments of designers across to the Contractor.

It is clear that Employers will continue to insist on this amendment to the standard form. However, it does bring into question how fit for purpose an unamended contract is if this amendment is so typically found in market practice.

“WITH REGARD TO THE AMENDMENTS TO THE PAYMENT REGIME TO BRING IT INTO LINE WITH THE FAIR PAYMENT PRINCIPLES, ANY CHANGE THAT CLARIFIES AND SIMPLIFIES MATTERS IS CERTAINLY TO BE WELCOMED”

It is not entirely clear whether the obligation for the Contractor to provide monthly updates is a condition precedent to its entitlement to Loss and Expense. The Contractor is entitled to reimbursement subject to compliance with the notification provisions of clause 4.20 (clause 4.19). The Design and Build Guidance does not give any steer on this issue.

With regard to the amendments to the Payment Regime to bring it into line with the Fair Payment principles, any change that clarifies and simplifies matters is certainly to be welcomed. It is unlikely however that these changes will stem the flow of disputes arising from failure by a party to correctly follow the regime.

In any event, the new drafting in the 2016 edition appears to be aimed at ensuring the Contractor provides the necessary information for the Employer to assess loss and expense and that the Employer carries out this assessment promptly.

## FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this Briefing, please speak with a member of our team below or your regular contact at Watson Farley & Williams.



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