

Meeting:	Contracts Working Group
Date:	Tuesday 6 June 2017
Time:	10:00am – 12:00pm
Location:	Eight Club, 1 Change Alley, London, EC3V 3ND – Duke Room
Chairman:	Paul Morrell OBE

1. Welcome and Apologies

2. Minutes of Last Meeting held on 8 March 2017 and Matters Arising

a) JCT Representation

b) Government Consultations

3. Best Practice in Construction Contracts – *see attached paper*

To review the common amendments to standard forms of contract identified by members.

4. JCT Current Issues

To consider any specific issues in advance of the JCT Council meeting on 8 June.

5. Any Other Business

Future Meetings

Wednesday 13 September 2017

Wednesday 6 December 2017

Common Contractual Amendments

Introduction

It was agreed at the last Contracts Working Group meeting that there could be a role for Build UK to play in identifying the most common amendments to the standard forms of contract and standardising how these are dealt with. Following submission by members of their most commonly encountered contractual amendments, Build UK has collated the information for review by the Working Group at the next meeting on 6 June. The examples, which generally reflect bad practice, have been categorised as either a ‘procedural’ or ‘risk transfer’ amendment and no views have been taken on their use at this stage.

1. Design

Number	Type	Amendment	Explanation
1.1	Risk Transfer	Main Contractor has a single point design responsibility for the works	The standard form terms mean the Main Contractor is not responsible for verifying the content of the Employers Requirements (“ERs”) or the adequacy of any of the Employer’s design at the point of entering into the contract. These provisions are nearly always amended to reverse the JCT standard form risk and liability so that the Contractor verifies the adequacy and accepts responsibility for all Employer’s design and the ERs.
1.2	Risk Transfer	Sub-Contractor takes on responsibility for all design work	The Sub-Contractor takes on full responsibility for all aspects of design of the Sub-Contract works whether or not such design or any aspect of it was, in fact, prepared by the Sub-Contractor.
1.3	Risk Transfer	Sub-Contractor accepts Main Contractor’s design	The Sub-Contractor has examined the Main Contractor’s requirements and agrees to accept full responsibility for all designs contained within them.

2. Documents

Number	Type	Amendment	Explanation
2.1	Procedural	Variants in documents	If there is any inconsistency between the Sub-Contract Documents and the Main Contract Conditions, the Main Contract Conditions shall prevail.
2.2	Procedural	Precedence of documents	Standard forms provide that the contract documents should be read together but frequently this clause is amended to provide an order of precedence so that the ERs are elevated over the Contractor’s Proposals (“CPs”).
2.3	Procedural	Compliance with ancillary documents	Certain specified documents, such as third-party agreements and project documents, are made part of the Contract.

3. Fitness for Purpose

Number	Type	Amendment	Explanation
3.1	Risk Transfer	The works will be fit for purpose	The Contractor confirms that the work will be fit for purpose. However, there is no clarity/definition of what Fit for Purpose is
3.2	Risk Transfer	Sub-Contractor warrants that the works will be fit for purpose	The Sub-Contractor warrants to the Main Contractor that the Sub-Contract Works will be fit for their purposes as made known to the Sub-Contractor

4. Nuisances

Number	Type	Amendment	Explanation
4.1	Risk Transfer	Sub-Contractor takes on risk of noise and nuisances	The Sub-Contractor is responsible for preventing all noise and nuisances when undertaking their Sub-Contract Works and shall indemnify the Main Contractor against any expense, loss or liability arising from such noise or nuisances

5. Ground Conditions

Number	Type	Amendment	Explanation
5.1	Risk Transfer	Status of surveys and reports provided by the Employer	Under the standard forms the Contractor accepts the risk of site conditions. Surveys and reports are made available by the Employer for the purpose of the Contractor's site investigations and accepting the site risk however, unless express amendments are made; the Contractor can rely on these surveys and reports this reverses the standard form risk profile.
5.2	Risk Transfer	Sub-Contractor accepts ground conditions	The Sub-Contractor agrees that they have had the opportunity of inspecting the physical conditions and any other conditions affecting the site and has obtained all necessary information as to risks. No failure on the part of the Sub-Contractor to discover or foresee any risk, even if it could be reasonably foreseen or not, shall entitle the Sub-Contractor to an increased sum or extension of time. Furthermore, the Sub-Contractor shall not rely on any survey, report or document prepared on behalf of the Main Contractor with regards to the ground conditions.

6. Extension of Time

Number	Type	Amendment	Explanation
6.1	Risk Transfer	Reduced scope for extension of time/loss and/or expense	The Sub-Contractor is unable to make a claim unless: a) The Main Contractor has a similar right under the Main Contract; and b) The Sub-Contractor has complied with any procedure for making such a claim as laid out in the Main Contract.

6.2	Risk Transfer	Concurrent Delay	Whether the Sub-Contractor is entitled to an Extension of Time due to a concurrent delay on site.
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7. Cross Contract Set Off

Number	Type	Amendment	Explanation
7.1	Risk Transfer	Cross contract set-off	The Main Contractor is able to deduct any money due from the Sub-Contractor either under this project or any other project.

8. Payment

Number	Type	Amendment	Explanation
8.1	Procedural	Payment will only be made to variations issued in writing	The Main Contractor will only make payment for variations issued in writing. If a variation is made due to an oral instruction, a Sub-Contractor may not be entitled to payment.
8.2	Procedural	Payment upon signed documents	No payment shall become due to the Sub-Contractor until the Sub-Contract Agreement and all required signed documents (such as collateral warranties) requested by the Main Contractor have been signed by the Sub-Contractor and returned to the Main Contractor.
8.3	Risk Transfer	Insolvency under a third-party contract – pay when paid	If the Employer or any other party responsible for paying the Main Contractor becomes insolvent and fails to pay, the Main Contractor will not be responsible for paying the Sub-Contractor for Sub-Contractor works.

9. Termination of Contract

Number	Type	Amendment	Explanation
9.1	Procedural	Termination of Main Contract	The Sub-Contract is terminated if the Main Contract terminates.
9.2	Procedural	Termination at will	The Main Contractor can terminate the contract at will and does not require the Main Contractor to compensate the Sub-Contractor for any loss of profit incurred as a result of such termination.
9.3	Risk Transfer	Possession of Sub-Contractor's Equipment on Termination	The Main Contractor has the right to take possession of all of the Sub-Contractor's equipment brought on site together with any materials, paid or unpaid for by the Main Contractor, use and, potentially, sell it.