

Insight

Insight provides practical information on topical issues affecting the building, engineering and energy sectors.

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A Game of Risk: JCT Design and Build Contracts



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Anyone who is involved in construction disputes all too often has to advise as to exactly which design risks have been transferred to a Design and Build Contractor and which design risks remain with the employer.

In this Insight we focus on the transfer of risk within the JCT Design and Build form of Contract, examining some of the key issues those entering into such contracts (often heavily amended) should, and need to, be aware of.

A quick recap: traditional procurement vs. design and build

Under the “*traditional procurement*” route, the design for a building is completed by the employer’s consultants. That finished design is then put out to tender. The employer retains the design risk through the construction process and is able to turn to his professional team if anything goes wrong in respect of the design. The obvious advantage to the employer of this traditional method of procurement is that they have complete control of the design and the quality level of the building.

Design and build contracts, broadly speaking, place the risk of the design on the contractor, although in reality the extent of the risk transfer can vary depending on the form of contract used and the bespoke amendments made to it. The rationale behind design and build is that the contractor can add value by ensuring the design can be built easily and/or cheaply by increasing the “*buildability*” of the design and hopefully reducing the costs associated with it. It also provides the employer with “*single point*” responsibility for the construction and design of the building, reducing the number of people they have to turn to if something goes wrong.

That’s all fine in theory, but how does this theory translate into practice in terms of the risk profile in the JCT Design and Build Contract – one of the most widely used forms of design and build contracts domestically?

Employer’s Requirements vs. Contractor’s Proposals

In simple terms the Employer’s Requirements are a statement of the client’s requirements. For example, we require a school for 500 pupils with sports facilities, catering and office space. In smaller fit-out packages the Employer’s Requirements can be as little as one or two sides long which are developed into more detailed requirements with the input of a contractor. In contrast, in longer projects they may run to many lever arch volumes of detailed specifications which are often the result of many months of input from the employer’s professional team.

Contractor’s Proposals are the contractor’s solution to the Employer’s Requirements. In the example given above, they may include concept drawings showing the proposed school along with whatever information the employer asked for in the Employer’s Requirements. The more detailed the Employer’s Requirements, the more the contractor’s hands are tied and, arguably, the less the contractor can bring to the table in terms of adding value for money and increasing “*buildability*” in any event. A “*design and dump*” by an employer may, therefore, bring little benefit to the employer other than single point responsibility.

Leaving this aside, these two documents are the key to understanding how the JCT Design and Build form of contract functions (including the most recent DB 2016) and how design risk is divided between the contractor and employer.

Unamended standard form

The unamended DB 2011 does not place the risk of verifying the design within the Employer’s Requirements on the contractor. This is key to the balance of risk within the DB 2011 and, indeed, the later updates by JCT of their Design and Build contracts.

Clause 2.11 of DB 2011² states:

“Subject to clause 2.15, the Contractor shall not be responsible for the contents of the Employer’s Requirements or for verifying the adequacy of any design contained within them.”
[Emphasis added]

Clause 2.17.1 of DB 2011³ then provides that:

“Insofar as his design of the Works is comprised in the Contractor’s Proposals and in what the Contractor is to complete in accordance with the Employer’s Requirements and these Conditions (including any further design required to be carried out by the Contractor as a result of a Change), the Contractor shall in respect of any inadequacy in such design have the like liability to the Employer, whether under statute or otherwise, as would an architect or, as the case may be, other appropriate professional designer holding himself out as competent to take on work for such design who, acting independently under a separate contract with the Employer, has supplied such design for or in connection with the works

to be carried out and completed by a building contractor who is not a supplier of the design”
[Emphasis added]

In other words, the contractor will owe a similar duty to the employer as an architect would (e.g. to use reasonable skill and care) in relation to their design. This is lower than the higher fitness for purpose obligation which may otherwise be implied under statute and common law.

Theoretically, then, if the DB 2011 is unamended, the division of responsibility for design should be clear. The employer is responsible for the design in the Employer’s Requirements. The contractor is responsible for completing that design.

Unfortunately, the reality is often different because of what the parties attach as the Employer’s Requirements and the Contractor’s Proposals. Indeed, it is not unknown for one document to be labelled as being both the Employer’s Requirements and the Contractor’s Proposals.

The JCT form itself assumes that the parties will take sufficient care during the negotiation process to ensure that they are compatible. Footnote 3 of the JCT D&B 2011 states that:

“Where the Employer has accepted a divergence from his requirements in the proposals submitted by the Contractor, the divergence should be removed by amending the Employer’s Requirements before the Contract is executed.” [Emphasis added]

Determining who has liability for what can become complicated down the line if the division between the Employer’s Requirements and the Contractor’s Proposals is unclear. Likewise, if the Employer’s Requirements have not been updated to reflect changes negotiated before signing, this can be a recipe for confusion down the line as memories fade or teams change.

For example, trying to unpick who specified or agreed to which materials or plant, in retrospect if the two documents are not compatible, can be very difficult and lead to unnecessary disputes.

The JCT Design and Build Contract (DB 2011 and DB 2016) provide for the notification of discrepancies between the Employer’s Requirements and the Contractor’s Proposals, but what happens if the parties can’t resolve their differences is not clearly spelt out and can be a recipe for dispute. Better to ensure the two documents are updated to reflect negotiations and sit together where possible.

Taking on responsibility for the design in the Employer’s Requirements

It is not uncommon to see Contractor’s Proposals that simply state that the contractor will meet the Employer’s Requirements. This is essentially the same as saying the Employer’s Requirements and the Contractor’s Proposals are one and the same thing and can cause huge confusion if the JCT form is not amended because it is premised on there being two separate documents.

Equally the employer frequently tries to expressly place the entire design burden (including the design in Employer’s Requirements) on the contractor using bespoke amendments.

At this stage a contractor tendering for the job may, in the rush to sign their contract, fail to realise the extent of the liability for the design they have taken on. If there is already a detailed design that has been done by the client’s team and the contractor is to take on responsibility for it, does the contractor actually have the time (or knowledge) to verify that it is complete and/or up to the requisite standard?

For an employer seeking to pass down all the risk to their contractor, a one-stop shop for liability can look attractive but it can backfire. Does the contractor really know what they are getting themselves into? Have

they had time to understand the design and what they are undertaking? If not, will they be able to carry out the job to time and budget? Is this a recipe for claims later on in the job? In the most extreme cases the risk can be so great that it pushes a contractor into insolvency. This is rarely in anyone’s interests. All these are things to consider when deciding how much risk to place on a contractor, although the extent of the risk will very much depend on the specific project.

But the employer’s design team will be novated so I don’t have to worry about my design risk?

The novation of the employer’s design team can, unfortunately, be seen as a magic pill to avoiding the risks taken on for what was essentially the employer’s team design where that risk has been passed on.

There are two key points that should be borne in mind when assessing what impact the novation of the employer’s team will have on the risk taken on by the contractor:

1. The novation must actually take place

This sounds obvious but rather unfortunately is all too often forgotten. During the negotiation period the employer and contractor discuss novation and agree that once the contract is signed the relevant team will be novated across. However, the reality is that this often does not happen, leaving the contractor without a claim against the design team and with the “risk” associated with the design taken on under the main contract.

Equally it is not unknown for some of the design team to be novated over but not all of the team. Depending on how the contract is worded, and the extent of any amendments, this can leave the contractor without cover for its liability on part of the design carried out by the consultants who were not novated.

2. The contracts must be back to back

If the contractor has taken liability for something under the main contract but the novated consultant doesn't have a back-to-back liability under their contract then the risk can't be passed down.

For example, an architect or other consultant (such as a mechanical and electrical engineer) only owes a duty to use reasonable skill and care at common law and this is normally reflected in their appointment. However, without the "watering down" provisions within the JCT Design and Build contract (e.g. clause 2.17.1), the contractor will owe the higher fitness for purpose obligation for their design. This may mean the contractor is on the hook for its design while the novated consultants walk away.

Change vs. design development

Finally, a contractor (and indeed employer) entering into a JCT Design and Build contract needs to be clear that there is a distinction between what will constitute a Change entitling a contractor to more money and time and "design development" giving rise to neither. Change is defined by reference to the Employer's Requirements rather than Contractor's Proposals.

Ultimately this may well come down to what is in the Employer's Requirements and whether they have been "changed" or "just developed". This may, in turn, depend on the level of detail and specificity within the Employer's Requirements.

A classic example of the difficulties in determining which is which can be found in the 2002 case of *Skanska Construction UK Limited v Egger (Barony) Limited*.⁴ In that case Skanska were responsible for the design in the Employer's Requirements together with such further design work as was necessary to develop the Employer's Requirements into fully workable designs. A dispute arose over additional works and whether these were merely "design development" or extras for which payment was due. In one case, the requirement to provide a

second water main, Skanska successfully argued that this was additional because the design within the Employer's Requirements only provided for one water main. However, in relation to the steel there had been no loadings or detailed design in the tender drawings included within the Employer's Requirements. Designing and supplying all of the steel fell within Skanska's obligations. The Court held that in so far as the Employer's Requirements could be perfected at a later stage, that was part and parcel of the design risk that Skanska had assumed.

Practical tips

Contractors and employers using the DB 2011 and the DB 2016 need to take care as to how the Employer's Requirements and Contractor's Proposals sit together in order to ensure it is clear which risk remains with whom. All too often the position is confused by the parties failing to update these two key documents after lengthy negotiations.

For those contracts that seek to place all risk on the contractor, then the contractor needs to ensure, so far as they have the power to do so, that any novated contracts offer the protection they require should things go wrong. This means making sure the contracts are truly back to back as well as ensuring they are actually novated.

Finally, the parties need to consider whether design and build can provide the benefits associated with it, if in reality the design has been completed before the contractor is involved. In such circumstances a one-stop shop may sound attractive but it can lead to problems down the line where a contractor has not had the time to consider properly what they are taking on before doing so.

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Footnotes

1. With thanks to David Bebb for his practical insight and Laura Bowler for her research and assistance.
2. See also clause 2.11 of DB 2016.
3. Clause 2.17.1 of DB 2016 has very similar wording.
4. [2002] EWCA Civ 1914, (2003) CILL 1969.

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