

JCT 2005 – THE CHANGES - FORM NOT SUBSTANCE?

The JCT with the help of its new publishers, Sweet and Maxwell, are in the process of issuing a completely new range of JCT Contracts

The Contracts published to date include:

Design and Build Contract	(known as “DB2005”)
Intermediate Building Contract	(known as “IC2005”)
Intermediate Building Contract (with Contractor’s Design Portion)	(known as “ICD 2005”)
Minor Works Building Contract	(known as “MW2005”)
Minor Works Building Contract (with Contractor’s Design Portion)	(known as “MWD2005”)

1. CHANGES ACROSS THE JCT RANGE

Structure and Layout

(a) Section Headed Format

The Contract Conditions have been divided into Sections and the same section headings have been adopted across all of the JCT 2005 Contracts. This should make it easier to locate specific provisions when working on different contracts. For example, Section 4 is the Payment Section for all Contracts

From WCD98, the Sections have been reduced in number and simplified, however, the effect of this has been to completely re-arrange the Conditions:

Section 1	Definition and Interpretations
Section 2	Carrying out the Work - this Section combines the Contractor’s Obligations to carry out and complete the Works, including his design obligations, with other related provisions:
(a)	Possession
(b)	Supply of Documents, Setting Out etc
(c)	Discrepancies and Divergences
(d)	Design Work – Liabilities and Limitation

(e)	Fees, Royalties and Patent Rights
(f)	Unfixed Materials and Goods
(g)	Adjustment of Completion Date
(h)	Practical Completion, Lateness and Liquidated Damages
(i)	Partial Possession by Employer
(j)	Defects
(k)	Contractor's Design Documents
Section 3	Control of the works - this section covers Access and the Parties' Representatives, Sub-Letting, Employer's Instructions, Antiquities and Compliance with the CDM Regulations
Section 4	Payment – this section covers all of the matters dealt with by Clause 30 of WCD98, together with Loss and Expense
Section 5	Changes – this section includes the definition of Changes and sets out the Valuation Rules to be applied
Section 6	Injury, Damage and Insurance - this section covers the matters dealt with by Clauses 20-22 of WCD98
Section 7	Assignment, Third Party Rights and Collateral Warranties – this section covers the Parties' Rights of Assignment and provides for Third Party Rights from the Contractor and the provision of Collateral Warranties
Section 8	Termination – this section provides an abbreviated form of Clauses 27, 28 and 28A of WCD98
Section 9	Settlement of Disputes – this section provides for Adjudication and Arbitration in accordance with Clauses 39A and 39B of WCD98 and introduces a new sub-section for the parties to Mediate a dispute

(b) Integration of the Supplements

The Supplements that were previously separate, at the end of the Contracts have now been integrated into the Contract Conditions. These include, Contractor's Design Portions and the Modifications (Sectional Completion)

On the face of it, the effect of these changes has been is to lengthen the Conditions. However the JCT is of the view that this is an acceptable trade-off when considering the long-winded and complex exercise of comparing the hard copy of the Contract and the Supplements together. (Although this is not the case if JCT on disc was used which automatically integrates the supplements)

By way of an example, in DB2005 the provisions which introduce Sectional Completion are as follows:

5th Recital:

“The division of the Works into Sections is shown in the Employer’s Requirements or in such other documents as are identified in the Contract Particulars”

In the Contract Particulars:

Against the 5th Recital is a requirement to provide a description of the Sections (if any)

There is also provision for Sectional Completion Dates, Sectional Possession Dates, Deferment of Possession of Sections, Sectional Liquidated Damages, Sectional Rectification Periods

Conditions

By clause 1.1, “Sections” means (where applicable) the sections into which the works have been divided as referred to in the 5th Recital and the Contract Particulars

Thereafter, the Conditions make reference to “the Works or a Section”

(c) Schedules

The JCT 2005 Contracts make greater use of Schedules so as to further shorten the length of the contracts. For example, under WCD98 there are three options for the insurance of the Works under Clauses 22A, 22B or 22C. Once the parties have made a selection, the other options are superfluous, however the superfluous provisions remain in the contract, thereby increasing its length

The Schedules are incorporated into the Contract Conditions by wording such as:

“Clause 6.7 Insurance Options

Insurance Options A, B and C are set out in Schedule 3. The Insurance Options that apply to this Contract are as stated in the Contract Particulars”

Schedule 1	Contractor’s Design Submission Procedure
Schedule 2	Supplemental Provisions – this schedule covers the Supplemental Provision under WCD 98, save for the submission of drawings etc to the Employer
Schedule 3	Insurance Options – this Schedule provides for options A, B and C. These options are akin to those provided by Clause 22A, 22B and 22C under WCD98
Schedule 4	Code of Practice – this is the code in respect of opening up and testing the Works as provided under WCD98
Schedule 5	Third Party Rights – this Schedule covers Third Party Rights from the Contractor to a Funder and Purchaser/Tenant
Schedule 6	Forms of Bond
Schedule 7	Fluctuation options – these options cover Clauses 36, 37 and 38 of the WCD98

(d) Project specific information

Previously, the project specific information was included in Appendix 1 to the contract, located after the Contract Conditions. This has now been replaced in all JCT 2005 Contracts, with the Contract Particulars which appear after the Articles of Agreement but before the attestation. (ie the signing pages). This brings together in the Recitals, Articles of Association and the Contract Particulars, all of the project specific information

Greater use is also made of the default entries. This provides for certainty, should the parties fail to complete the Contract Particulars in full, for example:

“Clause 6.11 – Professional Indemnity Insurance”

(If no amount is stated, insurance under Clause 6.11 shall not be required)

Level of cover for pollution/contamination claims

(If none is stated, the required level of cover shall be the full amount of the indemnity cover)

Expiry of required period of professional indemnity insurance:

(If no period is selected, the expiry date shall be six years from the date of Practical Completion of the Works)”

It should also be noted that the Contract Particulars are divided into two parts. Part 1: General, (which is similar to Appendix 1 of WCD98) and Part 2: Third Party Rights and Collateral Warranties

The second part provides project specific information as to these issues, as follows:

- (i) The identity of the Funder and Purchaser/Tenant to whom Third Party Rights are given by the Contractor
- (ii) The particulars required for specific Third Party Rights. For example, the level of maximum liability and the type of maximum liability – in respect of each breach, or an aggregate limit on liability

(e) Statutory material

The majority of statutory and procedural material has been deleted from the JCT 2005 contract. For example, the Construction Industry Scheme (CIS) and the VAT Supplemental Provisions

It is the JCT's view that there is no need to simply re-state in the Contract Conditions, statutory obligations and requirements. Again, the aim is to reduce the length of the Contract

2. DESIGN AND BUILD 2005 - SPECIFIC PROVISIONS

It should be noted from the outset that although some new procedures have been introduced and certain points clarified, there has been no new material alteration in risk allocation and the majority of the principles of WCD98 remain

It is the JCT's view that it has amended and changed the content and layout of DB2005 to more fully reflect the current needs of the parties

The most significant changes are as follows:

Article 1

The Contract Documents have been defined as being the Agreement (ie the Articles of Agreement), the Conditions, the Employer's Requirements, the Contractor's Proposals and the Contract Sum Analysis

Clearly, this definition will need to be amended to include the contract drawings etc. The use of an Appendix, such as Appendix 3 under WCD98, to additionally describe the Employer's Requirements, Contractor's Proposals and Contract Sum Analysis has not been adopted

Article 8

This Article provides for dispute resolution by way of arbitration. However, it only applies if, in the Contract Particulars, it is stated to apply

Under JCT 2005, it is for the parties now to opt in to arbitration, failing which litigation will apply. This is the opposite of WCD98

Design

(1) Design Submission Procedure

This is a new procedure introduced under DB2005, whereby the Contractor is prohibited from undertaking any work for which it is necessary to produce Design Documents until such time as he has complied with either the Design Submission Procedure set out in Schedule 1, or such other requirements as are stated in the Contract Documents (Clause 2.8). Where the Design Submission Procedure applies, if the Contractor fails to adhere to the Procedure then he is not entitled to be paid for any executed works

The Design Submission Procedure is intended to provide the Employer with an opportunity to review the design as it develops so as to ensure that he complies with the Contract. The Procedure is not to be used so as to enable the Employer to instruct a Change

The Employer is required to mark each Design Document “A”, “B”, or “C”

Where a Design Document is marked “A” the Contractor can proceed with the Works, as the Design Document complies with the contract

Design documents marked “B” have to be re-submitted to the Employer incorporating the Employer’s comments but the Contractor can nonetheless proceed with the Works

Where the Design Document is marked “C” the Contractor cannot proceed with the Works and must re-submit the Design Document to the Employer taking account of the Employer’s comments

In circumstances where the Employer does not return the Design Document within the specified time period (14 days), it is deemed to have been marked “A” and be in accordance with the Contract

Notwithstanding the Design Submission Procedure and the marking of Design Documents by the Employer, the Contractor remains responsible for ensuring that the Design Documents and the Works adhere to the Contract

It is questionable whether the Design Submission Procedure will be used in RSL build contracts. In the vast majority of cases, the Design Documents have already been prepared prior to the letting of the build contract and form part of the Employer’s Requirements. Often, Architect’s Letters of Appointment are novated to the Contractor

(2) Professional Indemnity Insurance

By Clause 6.11, the Contractor is required to take out and maintain professional indemnity insurance in respect of its design obligations. The level of cover and period of insurance from the date of Practical Completion of the Works, are confirmed in the Contract Particulars

It should be noted that if no level of cover is stated in the Contract Particulars, then the Contractor is not required to take out professional indemnity insurance. With regard to the insurance period, the default position is 6 years

The requirement to take out professional indemnity insurance is nothing new to RSL contractors. All comprehensive standard amendments to WCD98 impose such an obligation in terms that the Contractor has to take out and maintain professional indemnity insurance for 12 years from Practical Completion of the Works, (to mirror the limitation period by which the Employer has to bring a claim against the Contractor, on the basis that the build contract is executed as a Deed)

The Employer is also able to require the Contractor to provide evidence that such professional indemnity insurance has been taken out and is being maintained in accordance with the contract. However, the Employer's rights end here

It is therefore anticipated that this Schedule will be further amended, so as to enable the Employer to take out professional indemnity insurance, if the Contractor fails to do so in breach of contract. Thereafter, the Employer will be entitled to recover the cost from the Contractor

(3) Co-Operative Insurance Society Limited –v- Henry Boot Scotland Limited (2002)

In accordance with the findings in this case, by Clause 2.11, the Contractor shall not be responsible for the content of the Employer's Requirements, or for verifying the adequacy of any design contained within them, (with the exception of any conflict between the Statutory Requirements and the Employer's Requirements)

If it is found that the Employer's Requirements are inadequate and that inadequacy is not addressed by the Contractor's Proposals, then the Employer's Requirements will be corrected, altered or modified, which shall be treated as a Change

Notwithstanding the findings in the **Henry Boot** case, it is anticipated that these clauses will be amended so as to firstly, expressly require for the Contractor to be responsible for the contents of the Employer's Requirements and to verify the adequacy of the design and secondly to make the Contractor responsible for all discrepancies in the Contract Documents and any divergence with the Statutory Requirements, at no cost to the Employer

These have been common amendments used in WCD98

(4) Copyright

Subject to the payment by the Employer of all amounts due and payable to the Contractor under the Contract,, the Employer benefits from an irrevocable royalty-free, non-exclusive licence to copy and use the Contractor's Design Documents

The licence prohibits the reproduction by the Employer of the designs contained within the design documents for any extension of the Works. Authorship remains with the Contractor

Again it is anticipated that this Clause will be amended to delete the words: "subject to the payment by the Employer of all amounts due and payable to the Contractor". In circumstances where there is a dispute between the Employer and the Contractor, such a condition will prevent

the Employer from instructing a third party contractor to complete the Works

(5) Adjustment of Completion Date

New definitions have been included for this purpose

“Pre-agreed Adjustment” means the fixing of a revised Completion Date for the Works or a Section in respect of a Change or Provisional Sum work

“Relevant Omission” means the omission of any work or obligation through an instruction for a Change

(6) Extension of Time

Clauses 2.2.3 to 2.2.6 contain the provisions in relation to extension of time. The Relevant Events are now listed in Clause 2.2.6. However, the list is shorter than under WCD98 by reason of the fuller use of the ‘sweep-up’ provision in relation to the impediment, prevention or default, whether by act or omission, by the Employer or any of the Employer’s persons

(7) Defects

Rectification Period rather than Defects Liability Period !!

(8) Payment

Subject to service of a withholding notice by the Employer, the amount to be paid by the Employer is the amount stated in the payment notice, or where the Employer has failed to serve a payment notice, the amount of the gross valuation, (less retention and previous interim payments)

Under WCD98 where the Employer failed to serve a payment notice, the amount within the Contractor’s Application for Interim Payment became due and payable by the Employer

This is a subtle amendment, whereby the Contractor is paid what is due under the contract, rather than what he seeks by way of his Application

(9) Loss and Expense

The Contractor’s entitlement to loss and/or expense is dealt with by Clauses 4.19 to 4.22. The provisions are similar to those under WCD98 save that the list of matters, now known as Relevant Matters is reduced by reason of the fuller use of the ‘sweep-up’ provision in relation to impediment, prevention or default, whether by act or omission, by the Employer or any of the Employer’s persons

(10) Changes

Alternative A: Contractor's Price Statement has been deleted as a method of valuation of Changes under DB2005

(11) Injury, Damage and Insurance

The Insurance Options mirror those under WCD98, save that the insurance option under Clause 22D – Insurance for Employer's Loss of Liquidated Damages has been deleted

The Insurance Options are set out in Schedule 3 and are briefly:

Option A - applies to new buildings and requires the Contractor to take out a joint names policy for all risks insurance with a full reinstatement value of the works plus professional fees (Clause 22A)

Option B - applies to new buildings and requires the Employer to take out a joint names policy for all risks insurance for the full reinstatement value of the works plus professional fees (Clause 22B)

Option C - applies where existing structures are involved and requires the Employer to take out a joint names policy for the full reinstatement cost in respect of damage to the existing structures and their contents by specified perils, and a joint names policy for all risks insurance for the full reinstatement value of the Works plus professional fees (Clause 22C)

(12) Third Party Rights and Collateral Warranties

DB2005 offers the following options for the benefit of a Funder and/or Purchaser/Tenant

- (a) The Contractor to give Third Party Rights to a Funder and/or Purchaser/Tenant

This option makes use of the Contracts (Rights of Third Parties) Act 1999 which provides that a Third Party may enforce a term of a contract, if the contract expressly so provides. The particular rights conferred are set out in Schedule 5

- (b) The Contractor to give Collateral Warranties to a Funder and/or Purchaser/Tenant

It is envisaged that the parties will make use of the relevant JCT form (when it is published!) although it is open to the parties to make use of another standard form, or bespoke Collateral Warranty which is required by the Contract Documents

It should be noted that the rights conferred by the JCT form of Collateral Warranty are intended to be substantially identical to those

conferred as Third Party Rights. In other words, DB2005 includes within its wording a Collateral Warranty known as Third Party Rights from the Contractor in favour of a Funder and/or Purchaser/Tenant. In essence, the choice is between the Collateral Warranty written into DB2005 which it calls - Third Party Rights - or a separate document

- (c) The Contractor to obtain from Sub-Contractors and/or Consultants Warranties in favour of a Funder and/or Purchaser/Tenant

Where provided by Sub-Contractors, it is envisaged that the relevant JCT form will be used (when it is published!). Where the Collateral Warranty is provided by a Consultant, the parties will need to agree to use another standard form, or a bespoke Collateral Warranty which will be attached to and required by the Contract Documents

There is no JCT form of Consultant's Collateral Warranty

- (d) A Contractor to obtain from Sub-Contractors Collateral Warranties in favour of the Employer

The JCT is to draft a form of Sub-Contractor's Collateral Warranty in favour of the Employer, although it is open to the parties to agree to use another standard form, or a bespoke Collateral Warranty which will be required by the Contract Documents

It is anticipated that these provisions will be amended to include a further option whereby the Contractor is also to obtain from Consultants, Collateral Warranties in favour of the Employer

Part 2 of the Contract Particulars identifies which options are to be required. For example, it is possible for a Funder to obtain a Collateral Warranty from the Contractor, whereas Third Party Rights are conferred on the Purchaser/Tenant

It is essential to accurately complete the relevant parts of the Contract Particulars. As mentioned, under the Contracts (Rights of Third Parties) Act 1999, a Third Party may enforce a term of a contract if the contract expressly so provides. However, that Third Party must be expressly identified in the Contract by name, or as a member of a class, or as answering a particular description. In order to benefit from Third Party Rights, or a Collateral Warranty the beneficiary must be identifiable. An example of a class or description includes "all first purchasers" and/or "all original/first lessees" of the whole or parts of the Works

The Third Party need not be in existence when the contract is entered into. It is likely that the Funder will be a known Funder and expressly named in the Contract, alternatively, a class or description can be included, for example, "the lead bank providing finance for the project"

Where Third Party Rights are conferred on a Funder and/or Purchaser/Tenant, such rights shall have effect from the date of receipt by the Contractor of a notice identifying the beneficiary and the nature of their interest in the Works

Where the Contractor is to provide a Collateral Warranty in favour of a Funder and/or Purchaser/Tenant, he must do so within 14 days of receipt of the Employer's notice. With regard to the procurement of Collateral Warranties from Sub-Contractors and/or Consultants, the Contractor is required to do so within 21 days of the Employer's notice

To assist in this matter, Clause 3.4.2.4 requires it to be a condition of all Sub-Contracts that the Sub-Contractor shall provide Collateral Warranties within 14 days of a request to do so

Again, it is essential to accurately complete the Contract Particulars as to the Sub-Contractors and/or Consultants from whom Collateral Warranties are required

Unfortunately, the Employer's agents' headache of securing the provision of Collateral Warranties remains, albeit now in relation to Sub-Contractors and/or Consultant Collateral Warranties in favour of a Funder and/or Purchaser/Tenant and the Employer

It should be noted however, that the vast majority of RSL funders will consider Third Party Rights, or a Collateral Warranty from the Contractor to be insufficient. RSL funders normally require the assignment of the build contract from the RSL as a minimum

As mentioned, the Third Party Rights from the Contractor to a Funder and/or Purchaser/Tenant are set out in Schedule 5, which include:

- (a) for a Funder, a warranty from the Contractor that it has complied and will continue to comply with the Contract. The Contractor's liability in respect of this warranty is unlimited
- (b) for a Purchaser/Tenant, a warranty that as at and with effect from Practical Completion, the Contractor has carried out the Works in accordance with the Contract

If the Contractor is in breach of this warranty, then the Contractor will be liable to the Purchaser/Tenant for the reasonable costs of repair/renewal/reinstatement, to the extent that the Purchaser/Tenant incurs or becomes liable for such cost

The Contractor shall also be liable for other costs up to a maximum liability, if provided for in the Contract Particulars (for example, decant costs, rent loss etc). If the Contract Particulars do not specify a limit on liability, then the Contractor is not liable for any other losses

2. The Contractor warrants that it has not used materials other than in accordance with “Good Practice in Selection of Construction Materials” (Ove Arup and Partners)
3. Subject to the Contractor having been paid by the Employer a licence is granted in respect of the Contractor’s Design Documents in similar terms to that given to the Employer under the Contract
4. The Contractor warrants that he has taken out and will maintain Professional Indemnity Insurance as required by Clause 6.11 of the Contract and in Contract Particulars
5. The rights acquired may be assigned twice, subject to written notice having been given to the Contractor
6. In addition to points 1-5, the Funder also benefits from “step-in” rights whereby, if the Funder terminates the finance agreement, or if the Contractor seeks to terminate his employment under the Contract, the Funder has the opportunity to take over the contract and require the Contractor to accept the Funder’s instructions in place of those of the Employer

In order to allow the Funder this opportunity, the Contractor is required to give notice to the Funder prior to exercising any rights he may have to terminate the contract. The exercise of this right by the Funder is conditional upon the Funder accepting liability for the payment of any sums due to the Contractor, whether that liability arises before or after the “step-in”

In broad terms, the Third Party Rights mirror most comprehensive standard form Collateral Warranties used in connection with RSL build contracts and are therefore satisfactory

(13) Settlement of Disputes

(a) Mediation

Under DB2005, the parties may agree to attempt to resolve a dispute by mediation, whereby an agreed third party – a barrister, architect or surveyor – is used to assist the negotiation process. If a settlement is reached, the terms are recorded in a written agreement signed by both parties which is binding

Please note that the dispute is not determined by the Third Party

(b) Adjudication

The provisions as to Adjudication have been significantly shortened. Rather than setting out an adjudication procedure which complies with the Housing

Grants, Construction and Regeneration Act 1996, DB2005 imports the Scheme for Construction Contracts as the adjudication procedure

It is our experience that the Scheme for Construction Contracts places the responding party at a disadvantage, when compared to other adjudication procedures. Accordingly, it is anticipated that the Scheme for Construction Contracts will be amended, or deleted in favour of another adjudication procedure, particularly, as RSLs tend to be the responding parties

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Final Comment

Form, not substance – this is a fair reflection on the JCT 2005 Contracts, particularly, DB2005. However, this is not a negative statement

The JCT 2005 Contracts are written in plain English, are shorter and the use of the same section headings across the JCT range has been welcomed

In essence, DB2005 is the same contract as WCD98 re-worded and re-ordered. There is no material alteration in risk

There is still a need for comprehensive amendments from an RSLs viewpoint – but what did we expect, it is an industry standard not an RSL standard

However, the Collateral Warranty headache remains for RSLs in respect of Sub-Contractors' and Consultants' Warranties

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LECTURE NOTES

JCT2005

HUNTER & PARTNERS

FRIDAY 28 OCTOBER 2005

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