

5 TRAPS FOR THE UNWARY ON JCT CONTRACTS

(Part Two)

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REQUIREMENTS AND PROPOSALS – WHO TAKES THE RISK OF DISCREPANCIES

We are all familiar with the difficulties in ensuring that the Contract Documents reflect what we think we have agreed with the other Contracting Party and the reoccurring debate about priority of documents.

JCT Design and Build Contract has its own characteristics in respect of any discrepancies that are identified between the Employer's Requirements and the Contractor's Proposals after the Contract agreement is made.

The first recital to the JCT Design and Build Contract 2011 states:

"The Employer wishes to have the design and construction of the following work carried out and the Employer has supplied to the Contractor documents showing and describing or otherwise stating his requirements ('the Employer's Requirements')."

The second recital of the JCT Design and Build Contract 2011 states:

"In response to the Employer's Requirements the Contractor has supplied to the Employer:

- *Documents showing and describing the Contractor's Proposals for the design and construction of the Works ('the Contractor's Proposals');*
- *and*
- *An analysis of the Contract Sum ('the Contract Sum Analysis')."*

The Contractor's obligations are further described in Article 1 "Contractor's Obligations" as:

"The Contractor shall complete the design for the Works and carry out and complete the construction of the Works in accordance with the Contract Documents."

The Contract Documents are defined in the Definitions of the JCT Design and Build Contract 2011 which state:

"The Agreement and these Conditions, together with the Employer's Requirements, the Contractor's Proposals and the Contract Sum Analysis."

Under the JCT Design and Build Contract (the 2011 version being no different to earlier versions) an unresolved problem occurs when there is a discrepancy between the Employer's Requirements and the Contractor's Proposals.

For example, the Employer's Requirements may specify a particular manufacturer for sanitary ware whereas the Contractor's Proposals include for something different and, although both render the sanitary ware fit for purpose, there remains a discrepancy.

The problem with the JCT Design and Build Contract 2011 in this respect is that it is silent as to how this type of discrepancy is to be resolved and dealt with.

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There are varying views on how the Courts would interpret such a discrepancy including:

- (a) The Contractor is able to rely upon the strict wording of the third recital which states:

"The Employer has examined the Contractor's Proposals and subject to the Conditions, is satisfied that they appear to meet the Employer's Requirements."

- (b) The Contractor is obliged to meet the Employer's Requirements, even if an aspect of its accepted Proposals does not initially comply. The principle being that the overall structure of the Conditions is that the Contractor must provide a design that meets the Employer's Requirements.

This argument is further supported because the Employer has no power to amend the Contractor's Proposals, and there is therefore no means of affecting any change if the Contractor's Proposals always took precedence. Also foot note [3] of the recitals states:

"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."

Furthermore, without the words "appear" and "subject to the Conditions", the Employer would be said to be satisfied that the Contractor's Proposals meet the Employer's Requirements.

The use of the word "appear" is defined by the dictionary as "to give an impression" and the "Conditions" set out the priority of documents in Clause 1.3 and 2.2 and Clause 5.1 "Definition of Change" does not give power to the Employer for it to change the Contractor's Proposals.

The Contractor's Proposals should be an indication of how the Contractor is to comply with the Employer's Requirements; not an indication of how the Contractor wishes to construct the project or allocate risk. This is reflected in the wording of the first and second recitals.

In practice, the JCT Design and Build Contract 2011 is usually amended to clarify the Parties' intentions.

ADEQUACY OF DESIGN IN THE EMPLOYER'S REQUIREMENTS – WHO TAKES THE RISK?

We are all familiar with the overriding principles on design set out in the JCT Design and Build Contract 2011, however, since the case of *Co-Operative Insurance Society -v- Henry Boot Scotland & Others* (2002 84 CNO LR 164) the unwary have become rather more wary.

In this case, the Judge took the view that completing the design of the contiguous bored pile walls included examining the designs at the point that it was taken over, assessing the assumptions on which it was based and forming a view as to whether they were appropriate.

The JCT Design and Build Contract 2011 includes express provisions so that the Parties avoid the implied terms of the decision of *Co-Operative Insurance Society -v- Henry Boot Scotland & Others* (2002 84 CNO LR 164).

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The JCT Design and Build Contract 2011, under the heading of "Preparation of Employer's Requirements", states:

"Clause 2.11

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."

The JCT Design and Build Contract 2011 goes further under the heading of "Employer's Requirements - Inadequacy":

"Clause 2.12.1

If an inadequacy is found in any design in the Employer's Requirements in relation to which the Contractor under Clause 2.11 is not responsible for verifying its adequacy, then if or to the extent that the inadequacy is not dealt with in the Contractor's Proposals, the Employer's Requirements shall be corrected, altered or modified accordingly.

and

Clause 2.12.2

Subject to Clause 2.15 any correction, alteration or modification under Clause 2.12.1 shall be treated as a change."

The big risk to Contractors is the subtle amendments made to Standard Forms of JCT Design and Build 2011 which turn all of these provisions, and the intended allocation of risk and liability, upside down.

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