



myerson

# Building inSITE

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Meet our new construction team

JCT 2016 contract updates  
and what you need to know

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# Welcome to Myerson Building inSITE, where we will keep you informed of the latest construction updates.

In this issue, we will take a look at the important changes within the JCT 2016 Design & Build Contracts (JCT 2016), key changes to the payment mechanisms and why you should know about the new insurance provisions.

With complex construction contracts and the need to comply with strict legislation, it is vital to know about these changes and to seek the best legal advice.

From developers to consultants, sub-contractors to purchasers, our construction team works for you and with you to achieve your business goals.

At Myerson Solicitors we have the experience and expertise to provide dynamic contentious and non-contentious advice to those working across the construction industry.

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## Our New Construction Team.

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We are an award-winning, “Top Tier” Legal 500-rated law firm, specialist in advising and acting on procurement strategy, contracts and disputes for building, construction and engineering projects.

Our construction experts have more than twenty years of experience acting on high-value and complex construction matters.

Our new team is led by Neil Armstrong, who joins us as our 20th partner here at Myerson. He is highly regarded in the property and construction sector and is recommended by Chambers and Partners as being “one-to-watch”. The Legal 500 also identify him as one of the next generation of lawyers of note.

Neil’s arrival has increased the size of the Myerson property and construction group to nearly 30, including 6 partners.

He leads our skilled team of practiced solicitors, who advise new and long-standing clients including developers, contractors, sub-contractors, consultants, funders,

purchasers, tenants and occupiers on a wide range of projects, within a range of sectors.

Here at Myerson, we know it is extremely important to seek professional legal advice before entering into any form of building contract. Decisions made early on can have significant implications during a project or development and we have a strong team of solicitors with a breadth of experience to provide support and advice from the outset.

**For more information**  
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# JCT 2016

## Two years after publication, it's time to get involved.

Why you need to adopt the 2016 JCT forms and take advantage of the new provisions

It's been a while since the full suite of contracts was finally rolled out, and it's common for updated JCT forms to take a little time to filter through into every-day use.

The traditional trigger for widespread uptake is the removal from publication of the old forms, which happened to the old 2011 versions, at the end of April this year. For those involved in the construction industry, who have been clinging on to the 2011 forms, unless you are hoarding a stock of the old versions, it is time to update your standard schedules of amendments for contracts and sub-contracts and move on to the new forms.

The main features of the 2016 editions were to simplify the payment processes, to incorporate the JCT Public Sector Supplement 2011 that relates to Fair Payment, transparency and BIM (Building Information Modelling), to include the CDM Regulations amendments and to generally improve functionality and user-friendliness.

Remember, the 2016 updates are further reforms to the 2005 versions rather than large scale re-drafts, so they do not include changes to the overall allocation of risks and obligations but there are several key changes that users should be aware of.

### The Key Changes

#### Payment Provisions

Arguably, the most significant changes have been made to the payment terms and these are likely to have the biggest impact. The intention is to reflect the government's fair payment charter, to simplify and consolidate some of the drafting. The changes are also intended to speed up the payment process throughout the contractual chain so that all levels of the chain from the main Contractor down to Sub-contractors and Sub-sub-contractors are paid within the same 30-day period.

To reflect the fair payment principles, changes have been made to the interim payment due dates. This includes the introduction of a common interim valuation date that applies throughout the contract chain with the intent that all valuations are assessed and processed against the same period. Also, the payment period is now co-ordinated in the head contract and sub-contracts, so that there is sufficient time to process the applications and payments downstream to Sub and Sub-sub-contractors.



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A new procedure has been added for the prompt assessment of claims for loss and expense. This differs from the previous contract because it includes prescriptive time periods for submitting and reviewing information for both parties. For example, notification of the event is “to be accompanied, or as soon as reasonably practicable, followed by the Contractor’s initial assessment of the loss and expense incurred and.... likely to be incurred”. The Contractor is also to provide monthly updates. From the Employer’s perspective, its initial ascertainment is to be notified within 28 days, with further notifications issued within 14 days from any updates.

### CDM Regulations

JCT 2016 now fully integrates JCT Amendment No. 1 which was issued in 2015 into the contract, to take account of the update to the CDM Regulations in 2015.

### Building Information Modelling

One of the changes has been the incorporation of the JCT Public Sector Supplement 2011 that relates to fair payment, transparency and Building Information Modelling.

The parties can now specify a BIM Protocol to be adopted in the Employer’s Requirements. That protocol is a Contract Document and so the Contractor is obliged to comply with it, but the protocol will not override the conditions of the contract.

### Security

For the first time the JCT contracts include provisions allowing for the Contractor to provide a performance bond and/or a parent company guarantee, although there are no forms provided and there are no sanctions for a failure to comply.

### Collateral Warranties/Third-Party Rights

The old form dealt with collateral warranties and/or third-party rights from the Contractor, but only collateral warranties from Sub-contractors. This has now been extended so that Sub-contractors may be required to provide third party rights.

These were previously dealt with in Part 2 of the Contract Particulars, but they are now in clause 7.4 of the Rights Particulars which is a separate document. The Rights Particulars document details the rights required from the Contractor and Sub-contractors and the beneficiaries of those rights. If the Rights Particulars fail to specify the method of the rights i.e. whether it is by a collateral warranty or third-party rights, the party giving them can elect what it provides.

The JCT third party rights provisions have been amended to include a net contribution clause and the same clause is no longer an option in the JCT model forms of collateral warranty.

Where these JCT documents are to be used, special care needs to be taken because of the specific wording of these clauses.

### Insurance

There are widespread amendments to the insurance provisions, but they are generally not substantive. A key change is to include a further Option C relating to insurance for existing structures where the parties can put in place bespoke arrangements in circumstances where the standard Option C is not appropriate, through the use of a replacement schedule. This saves the parties from having to make extensive amendments to the terms.

So far, the construction industry has seemed disinclined to use the 2016 forms because the 2011 forms are regarded as sufficient. Another reason for the slow take up may have been the lack of guidance on the key changes. However, now that the publication of the 2011 forms has ceased and the JCT has issued the full suite of contracts along with guidance notes, it is time to adopt the 2016 forms and to take advantage of some of the new provisions. For those looking to do so, care will need to be taken when updating any schedules of amendments and drafting any sub-contracts to ensure that they sit back to back with the new forms.

We are supportive of the introduction of the fair payment provisions throughout the supply chain, but there have been many changes to the payment provisions in construction contracts in recent times. As can be seen from the recent rise of ‘smash and grab’ adjudications, many are still not fully up to speed on the current provisions. The JCT have introduced further changes to the payment provisions which will apply to all levels of the supply chain and this may prove difficult to keep on top of. Anyone that is moving to the new forms needs to ensure that they, and their project teams, are fully aware of their obligations set out in the revised payment provisions. The risks from a failure to comply are well known across the industry.

**Our solicitors at Myerson are well versed in drafting schedules of amendments, JCT contracts and sub-contracts, and can provide in depth training to your teams on the new payment regime should you require any assistance.**



## Key changes to the payment mechanisms.

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We examine the payment provisions of the standard form compared to those contained in the now defunct 2011 version, and provide an explanation of how the new payment mechanisms work in practice.

### The Key Changes

JCT 2016 has introduced the concept of a common Interim Valuation Date (IVD) which is built into all contracts, subcontracts and sub-sub-contracts. Establishing IVDs that operate down the supply chain is intended to reflect the government's fair payment charter. It also speeds up the payment process throughout the contractual chain so that all levels of the chain from the main Contractor down to Sub-contractors and Sub-sub-contractors, are paid within the same 30-day period. How the inclusion of IVDs and the surrounding payment mechanism has this effect in practice, is outlined below.

The Contractor remains entitled to claim for loss and expense incurred where the progress of the works has been materially impacted by a Relevant Matter (as described in clause 4.21 JCT 2016) such as a change in the

Employer's instructions. Further, JCT 2016 includes a new procedure for the ascertainment and notification of such loss and expense. Under JCT 2016 the Contractor is obligated to:

- notify the Employer as soon as the likely effect of the Relevant Matter on the progress of the works and the extent of any loss and/or expense becomes apparent;
- provide, an assessment of the loss and/or expense incurred (or likely to be incurred), together with such information as is required by the Employer to determine the amount; and
- update the Employer monthly as to the progress of the loss and/or expense, and provide such information as is necessary, to allow the Employer to ascertain the total amount of the loss and expense.

In return, the Employer must notify the Contractor of the ascertained amount within a strict 28-day timeframe from receipt of the original assessment and notification, and within 14 days following each update. The Contractor's failure to properly ascertain and notify loss and expense, as per the above, could render the Contractor barred from the reimbursement of those costs.

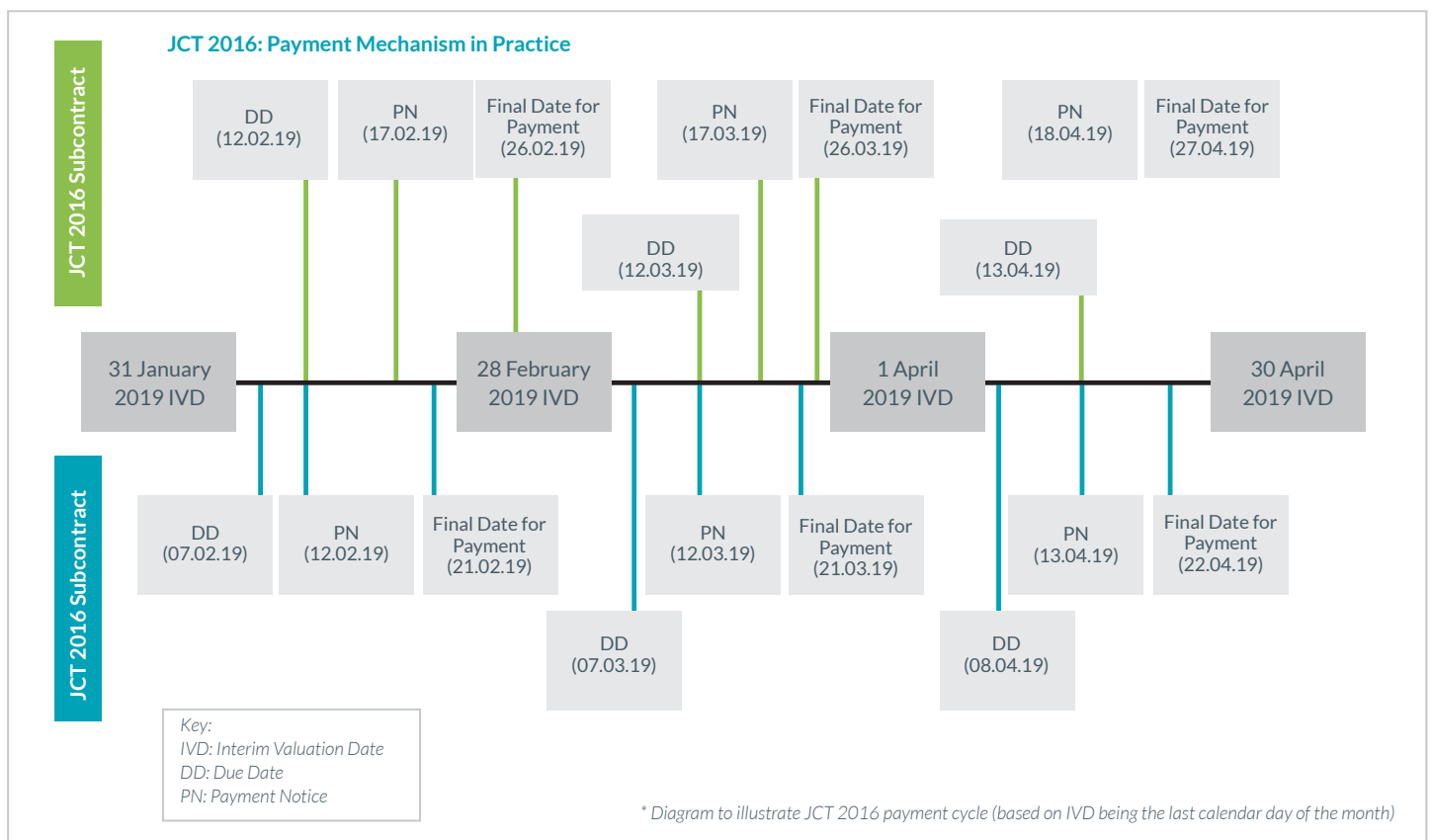
JCT 2016 provides greater choice and flexibility when dealing with fluctuations. The old fluctuation provisions (clause 4.19 of the 2011 version) have been removed and replaced with options set out directly in the Contract Particulars. When calculating the gross valuation of each Interim Payment, in accordance with either Alternative A or Alternative B (as set out in clauses 4.12 and 4.13 respectively), JCT 2016 sets out how these payments are calculated, including the values to be added and subtracted. The amount payable to the Contractor includes amounts equivalent to any applicable fluctuations as set out in the contract, provided adjustment for the fluctuations has not been made under the wider calculation provisions of 4.12 and 4.13 or the contract sum adjusted in accordance with clause 4.2.

The payment provisions in construction contracts are subject to the Housing Grants, Construction and Regeneration Act 1996. Where the payment terms in a construction contract do not comply with the Act then the statutory Scheme for Construction Contracts 1998 will imply terms into the contract.

This is potentially problematic as the inclusion of implied terms to poorly drafted payment provisions can create uncertainty and make it unlikely that all parties will be able to act in accordance with both the express and implied terms of the contract. JCT 2011 included different requirements for interim and final payments but, JCT 2016 has consolidated the notice requirements of the Act into the standard form contract.

The parties to JCT 2016 specify, in the Contract Particulars, what the first IVD will be. Thereafter, the IVD occurs on the same date each month (or the nearest business day if the IVD falls on a weekend or bank holiday). The default position, if the parties fail to specify the date is that the IVD will occur exactly one month after the date of possession.

The Contractor can make an application for payment (Interim Payment Application) at any time before the IVD. The Contractor makes the application based on the amount the Contractor considers due and describes the basis on which that sum has been calculated. For both interim and final payments, the Due Date is 7 days after the IVD and the Final Date for Payment is 14 days following the Due Date. Five days after the Due Date the Employer must issue a Payment Notice. The Payment Notice specifies the sum that the Employer considers due to the Contractor on the Due Date and the basis upon which that total has been calculated. Subject to a Pay Less Notice the Employer must pay the amount contained in the Payment Notice on (or before) the Final Date for Payment.



The IVD in the JCT 2016 sub-contract is the same date as that contained in the main JCT 2016. There is the option to require the Sub-contractor to submit its payment application at least 4 days prior to the IVD to ensure its application for payment is included in the Contractor's application, up-stream to the Employer. The Final Date for Payment has been shortened in JCT 2016 sub-contract (from 21 days following the Due Date to 14 days) but in overall terms the period has lengthened because the Due Date is later. The Contractor then has 5 days after receiving funds from the Employer to make the payment to the Sub-contractor.

Where the Employer in JCT 2016 (or Contractor in JCT2016 sub-contract) intends to pay less than the sum stated as due in the Interim Payment Application or Payment Notice, he must give notice to the payee of that intention by issuing a Pay Less Notice not later than 5 days before the Final Date for Payment. The sum contained in the Pay Less Notice must then be made on or before the Final Date for Payment.

### What Could Go Wrong?

The introduction of the IVD is intended to synchronise the payments throughout the contractual chain. The fair payment process is, therefore, only effective if a common IVD is used across all tiers of the project. In reality, as you progress down the contractual chain, the use of standard form contracts becomes less common, meaning the potential benefits may be lost or at least diminished.

In some months the IVD will not be a Business Day and will change to the nearest Business Day in that month. In such circumstances, the parties (and their advisors) will need to recalculate all subsequent dates in the payment cycle. This is a particularly problematic area for Employers. Such a minor change can have far-reaching consequences. Failure on the part of the payer in the contractual chain to issue a Payment Notice by the deadline, subject to a Pay Less Notice (discussed above), means the balance due is the total amount set out in the Interim Payment Application. The courts have consistently held that, irrespective of how inaccurate or inflated the amount demanded, it will all, nevertheless, be due and payable to the payee in such circumstances.

An amount not paid in accordance JCT 2016's payment terms will constitute a breach of contract and the overdue amounts will accrue interest. The payee can recover any unpaid amounts (and associated interest) as a debt and has the right to suspend performance of the works and even terminate the contract for non-payment. It is crucial, therefore, that parties take note of the dates which govern the payment mechanisms, as the consequences of missing such dates can be severe. The courts have in recent times adopted a hard line, against payers, in favour of an overarching objective of securing cash flow down the construction supply chain.

**It is, therefore, extremely important to seek professional legal advice before making the switch to JCT 2016. Many problems can be avoided by ensuring that the contracts at all levels of the supply chain are carefully drafted at the outset.**



## Are you up to speed on the new insurance provisions?

We compare the insurance provisions of the standard JCT 2016 form to the now defunct version and explain how the new insurance mechanisms work in practice.

### Insurance – Background

The insurance terms of JCT 2016 are found in Clause 6 and Schedule 3.

There are five main types of insurance required by JCT 2016, namely:

- **Employers' liability insurance** protects against Employers' liability for injury of employees arising in connection with their employment (clauses 6.1 – 6.4 JCT 2016).
- **Insurance against non-negligent withdrawal of support** covers potential structural damage to neighbouring property caused by the withdrawal of support (clause 6.5).
- **Insurance of the works and of existing structures** covers physical damage to the works, site materials and existing structures (if there are any) (clauses 6.7 to 6.11 and Schedule 3 JCT 2016)
- **Public liability insurance** covers liability arising from death or personal injury to, or damage to property belonging to, third parties (clauses 6.1 – 6.4 JCT 2016).
- **Professional indemnity insurance** insures against liability arising from professional negligence. Architects, engineers and other professional consultants that owe a design responsibility to the Employer are usually required to maintain such insurance (clauses 6.15 and 6.16 JCT 2016).

In addition to the above, there are a number of less common types of insurance which, depending on the specifics of the construction and the parties involved, may be necessary, including:

- **Product liability insurance** protects against liability for injury to people or damage to property, arising out of products supplied by a business. Suppliers of equipment such as lifts or escalators, may be required to maintain such insurance.
- **Latent defects insurance** protects against the cost of remedying the structure of a building, due to a defect. Typically, the insurance lasts for ten years following construction.
- **Strict liability insurance** protects against strict liabilities, such as those arising in nuisance (clause 6.5 JCT 2016).
- **Liquidated damages insurance** compensates for delay to the project where damages are not recoverable from the other parties, for instance, in the case of an event of force majeure.
- **Business interruption insurance** protects against situations where a business's sole premises are so damaged that they cannot be used.
- **"Run-off" insurance** protects ex-partners and ex-directors etc, who have left their positions, from liability incurred during the course of their appointment.

Making sure properly suitable insurance is taken out by the respective parties to a construction project is essential. The liability allocated to a party under JCT 2016, or any other construction contract for that matter, is likely to be considerable. The mechanism of protecting against this liability often takes the form of insurance. An appropriate insurance policy protects all the parties, including the party to whom a particular liability is owed. The sums involved are often such that the liability could not be discharged without the existence of insurance. A successful insurance claim is often the only means of paying the remedial cost when things go wrong.

A common misconception is that liability is capped in accordance with the level of insurance required by JCT 2016. However, this is not necessarily the case. If an architect contracts to maintain a level of professional indemnity insurance equivalent to £5 million per claim, this would not in itself limit liability to that amount. If there was a claim for £8 million, the architect's own assets would be at risk. Provision to cap liability at the same level, as the insurance requirement can be included within JCT 2016, but this must be expressly provided for – the insurance requirement alone does not create such a cap.

## Key Changes to JCT 2016

Arguably, the most important type of insurance is the policy insuring the works and any existing structures. Clause 6.7 provides for three insurance options (A, B and C), as shown in the JCT, in Schedule 3. The parties select the applicable option in the Contract Particulars. In each case, the party responsible affect a Joint Names Policy, being an insurance policy, which includes the Employer and Contractor as named insureds and under which the insurers have no right of recourse against any person so named (or, as the case may be, any person recognised as such i.e. Sub-contractors) (a Joint Names Policy). The Joint Names Policy, under the insurance option that applies, subsequently covers the parties against loss or damage by the specified perils and must be maintained until practical completion of the development.

Insurance Options A and B are used in the construction of new buildings. Insurance Option A is applicable where the Contractor is required to take out the Joint Names Policy for "all risks" insurance of the works. Whilst Insurance Option B is applicable where the Employer instead elects to take out the Joint Names Policy. JCT 2016 makes widespread amendments to Options A and B. However, the majority of these are not substantive changes. The amendments simplify the drafting, by stripping out the repetition in Schedule 3 and moving operative provisions into the body of Clause 6. For instance, the provisions relating to evidence of insurance are now contained in Clause 6.12, rather than duplicated in each of the Insurance Options in Schedule 3. Similarly, provision for insurance claims and reinstatement is now contained in Clause 6.13.

Substantive changes have, however, taken place to Insurance Option C. This option is used in the case of alterations of, or extensions to, existing structures. This option provides for the Employer to insure both the works and the existing structures. However, JCT 2016 has recognised that securing an appropriate Joint Names Policy for a tenant Employer's fit-out or refurbishment works can be difficult, particularly where the insurance of the existing structures is the landlord's responsibility, which is often the case in large multi-let buildings. Often the landlord of a building is best placed to affect this type of insurance. However, the commercial reality is that a landlord may be unwilling to add Contractors and Sub-contractors to its building insurance policy due to the likely impact on future premiums. Therefore, a tenant Employer's obligation to insure can be very difficult (and expensive) to perform. JCT 2016 provides greater flexibility by allowing the parties to disapply paragraph C.1 of Schedule 3 and instead include bespoke arrangements in the form of a C.1 Replacement Schedule.

## How the Insurance Mechanisms Work in Practice

Clause 6.3 of JCT 2016 sets out the default position where Insurance Option C applies, i.e. the Employer insures the works and the existing structures. A Contractor is not liable to an Employer for loss or damage to an existing structure when it is caused by a specified peril which should have been covered under a Joint Names Policy placed by the Employer. This is the case even if the loss is caused by the Contractor's negligence. This default position can be varied by a C.1 Replacement Schedule.

Let's say a tenant of an impressive city centre office development carries out a redevelopment of its offices which comprises a portion of the building. The redevelopment could have far reaching and costly implications in the event of damage to the rest of the building. It may not be feasible, commercially, for the tenant Employer to effect cover for the existing structures (in addition to the works) where the value of the building (including the contents thereof) vastly exceeds the value of the works. Therefore, paragraph C.1 of Schedule 3 could be disapplied and a C.1 Replacement Schedule included. The Contractor could rely on its annual cover for liability arising out of damage to existing structures. The upper limit of the Contractor's cover would likely need increasing to account for the nature of the multi-tenanted high-quality office space and the extent of potential liability this entails.

In scenarios like the above, insurance premiums are likely to be very expensive and disproportionate to the sums payable in the building contracts. Detailed and comprehensive drafting of the C.1 Replacement Schedule to properly reflect the assumed risks is essential. A C.1 Replacement Schedule must outline the alternative insurance arrangements in substantial detail. The risk being that, failure to do so can result in gaps in the insurance coverage, which can prove incredibly costly down the line. JCT advise that a C.1 Replacement Schedule should not be used without first consulting an insurance professional.

An explanatory summary of the alternative arrangements generally adopted, in the form of a C.1 Replacement Schedule, are contained in the Design and Build Contract Guide 2016, for instance:

- for low value projects (e.g. domestic refurbishments) the Contractor is often able to cover the risk of loss/damage to existing structures under its public liability insurance;
- for high value projects (e.g. tenant Employer of a multi-let building) more complex insurance arrangements involving different layers of different cover and/or risks is likely required; or
- for very high value projects, the tenant Employer and the landlord of the building may agree that a level of cover below the full reinstatement value will suffice.

The alternative arrangements included in a C.1 Replacement Schedule will depend heavily on the specifics of the project and the insurance market. It is uncertain how the difficulty of who will insure existing structures will be reflected in the products secured by insurance brokers. At the very least, its inclusion in the Contract Particulars increases awareness of these issues and highlights the importance of allocating and apportioning risk properly.

**It is extremely important to seek professional legal advice before entering into any form of building contract. Decisions made early on, such as selecting the Insurance Option can have significant implications during the course of the development. Many problems (and even potential litigation) can be avoided by ensuring that the necessary contracts are carefully drafted at the outset.**





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