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# MASTERING CONTRACTS: JCT 2005

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## Introduction

In June this year the Joint Contracts Tribunal ("JCT") published its Revised Contracts covering the whole of the JCT range of publications. The publication of Revised Contracts will continue throughout the rest of this year and into 2006.

The Standard Form of Building Contract and Design and Build Contract are two of the most popular within the Construction Industry (and I use the word "popular" in terms of number of projects they are used on) and any revision to these Contracts obviously has considerable importance.

In the past the Industry has been reluctant to adopt new forms of contract, or even new versions of the same contract. I still, on occasion, get across my desk 1980 Editions of the JCT Standard Form of Building Contract or Design and Build Contract which the parties have recently used for the purpose of constructing a project. This is something that I find astonishing considering the introduction of the Housing Grants, Construction and Regeneration Act 1996 with all the ramifications and implications that has had on construction contracts.

I hope that the Industry will not be so slow to adopt the new 2005 Editions of these two Contracts because, on the whole, I believe that both Contractors and Employers will benefit. Some of the benefits include the following:

1 The format of the Contract has been radically changed, both in terms of layout, arrangement of clauses and the various Supplementary Schedules which replace the old Appendix.

2 There are no longer any separately published Supplements to the Standard Building Contract. The Contractor's Design Supplement and Sectional Completion Supplement are now integrated into the Contract.

3 Optional clauses no longer form part of the Contract Conditions but are contained in Schedules.

4 The existence of third parties who have an interest in enforcing the terms of the Contract is now acknowledged. There is a choice either of obtaining warranties for these parties or, alternatively, the ability to utilise the Contracts (Rights of Third Parties) Act 1999.

5 There are no separately published local authority versions of the Standard Building Contract, the provisions relating to local authorities are incorporated within the Contract Conditions.

6 Headings and, insofar as possible, the text of the Contract Conditions, are consistent across the Standard Building Contract and the Design and Build Contract.

Dealing with those changes in more detail:

**Formatting of the Contract**

All the Contracts across the entire JCT range now have a common layout, with the following common section headings.

Section 1 - Definitions and Interpretations;

Section 2 - Carrying out the Works;

Section 3 - Control of the Works;

Section 4 – Payment;

Section 5 – Variations;

Section 6 – Injury and Damage Insurance;

Section 7 – Assignment, Third Party Rights and Collateral Warranties;

Section 8 – Termination;

Section 9 – Settlement of Disputes.

This should make it easier to locate particular provisions in each Contract.

The reformatting of the Contracts into Sections, each of which covers a particular aspect of Construction Works, has meant a complete rearrangement of the Conditions, particularly in the Standard Building Contract and the Design and Build Contract. The intention is, of course, that these clauses are now more logically grouped so that it is not necessary to flick backwards and forwards within the Contract in order to locate and identify each of the party's obligations.

**Separate Supplements Dispensed With**

Anyone familiar with the JCT 1998 Private With Quantities form will be aware of the Contractor's Design Portion Supplement, Sectional Completional Supplement and the composite Contractor's Design Portion and Sectional Completion Supplement, which needed to be incorporated into the Standard Form if the Employer wished to take advantage of them. Each supplement came in a With Quantities and Without Quantities version. It was

necessary to check to make sure that the supplement that you intended to use incorporated the same amendments as the Main Contract. You were then faced with the rather laborious task of having to read the Contract in tandem with the chosen supplement, cross-referencing the numerous amendments to the recitals, articles and clauses.

I am pleased to say that the new JCT 2005 Standard Building Contract has done away with this task by incorporation of the Contractor's Design Portion and Sectional Completion into the text of the Standard Building Contract. This is achieved by simply retaining or deleting the optional recitals, e.g. if the Works are to have Sectional Completion, then Recital 6 should be retained, but otherwise it should be deleted. If there is an element of the Works which is to be designed by the Contractor, then Recitals 7 to 10 should be retained, but otherwise they should be deleted.

The 1998 editions of JCT contain all the information specific to the Project in Appendix 1 towards the end of the Contract. This Appendix is now called the "Contract Particulars" and has been moved so that it is to be found immediately after the Articles of Agreement. The Contract Particulars contain an entry for Recital 6, Sectional Completion and space for a description of the Sections of the Works. Equally, if elements of the Works are to be designed by the Contractor, then there are entries for Recitals 7 to 9 for description or identification of the documents containing the Employer's Requirements, Contractor's Proposals and CDP analysis.

The Contract therefore follows a logical progression, with the Articles of Agreement giving a summary of what the parties require. The Contract Particulars provide information specific to the project and the Terms and Conditions are generic. By simple amendments to the Recitals and insertion of information in the Contract Particulars, the provisions relating to sectional completion or Contractor's Design in the text of the Terms and Conditions are activated. There is no need to make any amendment to the Terms and Conditions themselves.

**Use of Schedules**

As stated earlier, in the 2005 Editions many of the optional clauses such as the insurance provisions, fluctuations and the Clause 13A Quotation, are now incorporated in separate Schedules at the back of the Contract. This is to be contrasted with the 1998 Editions which incorporate the optional clauses into the main text of the Terms and Conditions. The 2005 Edition allows the use of the Contract with or without the whole or part of a Schedule. It is fairly simple to utilise the Schedules and incorporate them into the Contract by brief cross-referencing between the Contract Particulars and the Terms and Conditions.

For example, the insurance options at Schedule 3 (in respect of which a decision will always need to be made):

> In the Contract Particulars, against the entry for Clause 6.7 in Schedule 3, the three options are listed and simple deletion of those which are no longer required is all that is necessary.

In the Terms and Conditions, Clause 6.7 states:

> Insurance Options A, B and C are set out in Schedule 3. The Insurance Option which applies to this Contract is that as stated in the Contract Particulars.

The JCT 2005 Editions, like the 1998 Editions, contain a Schedule which sets out in full the forms of bond which may be required from each party. The JCT 2005 Editions, however, also contain, at Schedule 5, the third-party rights for purchasers, tenants and funders in relation to the Building Contract. Incorporation of these rights is by way of the Contract Particulars and operation of the Contracts (Rights of Third Parties) Act 1999. The parties have a choice of either utilising the Contracts (Rights of Third Parties) Act 1999 or, more traditionally, at Part 2 of Schedule 5 the British Property Federation warranties which are identified as being required for purchasers, tenants and funders.

The Construction Industry has been slow to accept the Contracts (Rights of Third Parties) Act 1999. This resistance to change is no doubt in part because the banks and institutions which fund commercial developments are, in many respects, even more conservative than Contractors. The inclusion in the JCT of an option to use the Contracts (Rights of Third Parties) Act 1999 I think is a huge step forward in acceptance of that Act, and should result in a reduced reliance upon collateral warranties.

**Omissions from the Contracts**

Having talked about the inclusions in the Standard Form of Contract, the other change that users will note is that large elements of the Contract no longer remain. This is particularly so in relation to statutory procedural material, the Construction Industry Scheme, the VAT Supplemental Provisions and CDM Regulations which have all been removed. The extensive VAT provisions have been reduced to the following single clause:

> 4.6.1 The Contract Sum is exclusive of VAT and in relation to any payment to the Contractor under this Contract, the Employer shall in addition pay the amount of any Value Added Tax properly chargeable in respect of it.

Similarly, the Construction Industry Scheme provision consists of:

> 4.7 Where it is stated in the Contract Particulars that the Employer is a 'contractor' for the purposes of the CIS or if at any time up to the payment of the Final Certificate the Employer becomes such a 'contractor', the obligation of the Employer to make any payment under this Contract is subject to the provisions of the CIS.

thus avoiding the 14 sub-clauses that are contained in the 1998 Editions of these Contracts. Nominated Sub-Contractors no longer exist and the separate clauses relating to Performance Specified Work have also been dispensed with.

The result is that both Contracts, and particularly the Standard Building Contract, are much clearer, concise and easier to read, with the Terms and Conditions being arranged in logical section-headed formats. The language of the Contract is less convoluted, there is less cross-referencing to clauses within different sections of the Contract, substantially reducing the number of times you have to plough backwards and forwards to get the full meaning of particular provisions.

While the formatted appearance of the Contract has substantially changed, the content of the Terms and Conditions has been subject to less change. There have, however, been a number of amendments which I would like to consider.

**Contractor's Design Obligations**

Under the Standard Building Contract when the Contractor's Design Portion Supplement is used, the Contractor's design obligations are set out in Clauses 2.2 and 2.19. The design obligations in the Design and Build Contract are set out in Clauses 2.1 and 2.17. In both Contracts, the obligations of the Contractor in relation to design are limited to the design it produces and there is express exclusion of any liability for the Employer's design. In the Standard Building Contract the exclusion is contained in Clause 2.13.2 and in the Design and Build Contract it is contained in Clause 2.11. The wording is the same in both Contracts (apart from clause numbers):

> Subject to Clause [2.17](1) [2.15](2), the Contractor shall not be responsible for the contents of the Employer's Requirements or for verifying the adequacy of any design contained in them.

This express exclusion of liability for the contents of the Employer's Requirements arises as a result of the case of *The Co-operative Insurance Society Limited* v *Henry Boot Scotland Limited* (July 2002) (2002 CLJ Volume 19, page 109).

The case concerned the JCT 1980 Standard Form of Building Contract Private with Quantities, including Contractor's Design Portion Supplement. The Contractor under the Contract was, amongst other things, responsible for the design of the earthworks support to sub-basement excavations, bored bearing piles to foundations and contiguous bored piled walls, together with temporary propping to the contiguous bored piled walls and temporary supports and propping to the walls of adjoining properties.

The Contract contained a number of additional conditions, namely:

> Clause 2.11 required the Contractor to ensure the proper integration and compatibility of the various elements of the Works, one with another, and with the remainder of the Works; and
>
> Clause 2.12 made the Contractor responsible for the co-ordination of the design to the extent that such design was stated in the Contract Documents to be the responsibility of the Contractor.

In addition, there were unusual features in the way in which the Contract Documents had been prepared. There should have been separate documents for the Employer's Requirements, Contractor's Proposals and Contract Sum Analysis in respect of the Contractor's Design Portion, but none was actually used, although there was reference to both the Employer's Requirements and the Contractor's Design Portion in sections of the Bills of Quantity.

His Honour Judge Seymour QC, who heard the case, decided that the Contractor was responsible for satisfying itself, using reasonable skill and care, that assumptions upon which the pre-existing design had been proposed and which the Contractor was responsible for developing to the point where it was capable of being constructed were appropriate and in doing so this involved checking the Employer's Design was not defective or negligent.

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(1) Standard Building Contract

(2) Design & Build Contract

It is arguable that this case does not provide any guidance on the interpretation of the JCT 1998 Standard Form of Building Contract and Contractor's Design Contract because of the bespoke amendments that were incorporated, coupled with the manner in which the Contract was set up without any Employer's Requirements or Contractor's Proposals. The case has, however, been treated as providing guidance on the interpretation of the Standard Forms and, as a result, the accepted interpretation is that the 1998 Contracts require the Contractor to check the Employer's Requirements.

Under the 2005 Editions, the Contractor is expressly excluded from any responsibility for the adequacy of the design in the Employer's Requirements by virtue of Clause 2.13.2 in the Standard Building Contract and Clause 2.11 in the Design and Build Contract.

Whether the JCT likes it or not, when using the 1998 versions of the Standard Form of Contract with Contractor's Design the Employers frequently insert a provision expressly requiring the Contractor to check the Employer's Requirements and I do not anticipate that this practice will change.

**Design Submission Procedure**

Another significant alteration, connected with Design, is the introduction of a Design Review Procedure, both in the Standard Building Contract when the Contractor's Design Portion has been selected and also in the Design and Build Contract, which require the operation of the Procedure. The Procedure is based upon that which is contained in the JCT Major Project Form.

The Contractor is required to submit two copies of all design documents, e.g. drawings and detailed specifications it prepares to the Employer or the Architect (as the case may be) for review.

Within 14 days of receipt of that documentation, or if a date for submission of documents has been previously agreed, within 14 days of that date (whichever is the later), the Employer/Architect must have reviewed the documentation and returned it to the Contractor marked with 'A', 'B' or 'C'. If the Employer/Architect does not respond within the 14 days allowed, the documentation is regarded as having been marked with an 'A'.

The significance of 'A', 'B' and 'C' is as follows:

1 'A' means the Contractor can carry out the Works in strict accordance with that document;

2 'B' means that the Contractor may carry out the Works in accordance with that document, provided that comments are incorporated into it and an amended copy of it is promptly submitted to the Employer/Architect;

3 'C' means that the Contractor is required to take account of the comments on it and either promptly resubmit it to the Employer/Architect in an amended form for comments in accordance with the Design Submission Procedure, or notify the Employer/Architect that it considers the design is in accordance with the Contract and that compliance with the comments would give rise to a Change. The Contractor is required to make that submission within 7 days of receipt of the drawings with

comments on them, failing which it is deemed that the comments do *not* give rise to a Change.

The whole procedure is designed to operate fairly quickly and consequently any design document that is not returned marked up by the Employer/Architect within 14 days of its submission is deemed to be marked 'A'. To ensure that the Contractor complies with the Design Submission Procedure, the Contractor is not entitled to be paid in respect of any works for which Design Documents should have been submitted, but in respect of which there are no Design Documents with the status 'A' or 'B'.

It is relatively easy to anticipate that on large projects the amount of documents passing from the Contractor to the Employer/Architect requiring review and comment will be extensive. Employers when using the Design and Build Contract are in the habit of novating the majority of their professional design team across to the Contractor at the stage of entering into the Contract. Thereafter they retain only the Quantity Surveyor and Employer's Agent. This practice may have to be reconsidered if they are to operate the Design Submission Procedure effectively.

The JCT 2005 Contracts now contain express provisions whereby the Contractor can be required to take out Professional Indemnity Insurance. The Professional Indemnity Insurance clause is Clause 6.11 in both the Design and Build Contract and Standard Building Contract. It is activated by an entry in the Contract Particulars specifying the amount of cover required. If no amount of cover is entered in the Contract Particulars, it is assumed that Professional Indemnity Insurance is not required. The Contract Particulars need to be carefully completed as not only is there a requirement that the level of cover needs to be inserted, but it is also necessary to identify whether it has any restriction on the level of cover in respect of pollution and contamination claims and the period for which the insurance policy is required to be maintained. Normally this would be either 6 or 12 years from Practical Completion; the default period is 6 years.

Both the Design and Build Contract and the Standard Building Contract state that the Contractor retains copyright in his Design Documents, which is quite an interesting concept, particularly as the Contractor's Design Documents will be based on a design prepared by the Employer, copies of which will have been provided to the Contractor under a licence to use them for the purposes of constructing the Project. While I accept that there may be design details which have been prepared by the Contractor which are original and consequently it is entitled to claim copyright on those documents, it is difficult to see how the Contractor can claim copyright in relation to all the Design Documents, as but for the licence granted by the Employer, it would itself be in breach of copyright.

The Contractor, having claimed copyright in all the Design Documents, generously grants a licence permitting the Employer to reuse the content of those documents for any purpose in connection with the Works, subject to the Contractor having been paid all sums due to it under the Contract.

**Payment**

The format of the Contract was obviously changed quite radically, but the contents of the payment provisions remain fairly familiar. Those who regularly use the JCT Contracts, particularly the Standard Building Contract, will notice the removal of all provisions

relating to Nominated Sub-Contractors. The consequence is that the provisions have become simplified. There remain, however, provisions for listing named sub-contractors whom the Contractor may sub-contract with, and the procedure for this remains as in the 1998 Edition.

The fluctuation provisions have been removed and are now to be found in a separate form, which is only available over the internet.

The principal alteration in the payment procedure is contained in the Design and Build Contract. In the 1998 Edition the trigger for payment was the Contractor's Application, and unless the Employer issued his own notice specifying the payment proposed to be made or issued a Withholding Notice, both of which had to be done within the timescales required in the Contract, then the Employer was obliged to pay the Contractor's Application in full. In the Design and Build Contract 2005, the status of the Contractor's Application is significantly different. While the trigger for payment remains the Contractor's Application, and the Employer still has an opportunity to give his own Notice specifying the payment proposed to be made or issue a Withholding Notice, should the Employer fail to do either, the Employer's obligation is only to pay the amount due to the Contractor, as determined in accordance with the Contract and not the full amount of the Contractor's Application, unless that is the amount that the Contractor is entitled to, as determined by the Contract Conditions.

This important change removes the risk of the Employer making an administrative blunder and thus becoming liable to pay the Contractor the full amount of the Contractor's Application, even though it does not properly reflect the Contractor's entitlement under the Contract.

Other minor points to note are that where the Contractor has Design Responsibility, i.e. the Contractor's Design Portion is being used under the Standard Form of Building Contract or the Contract is a Design and Build Contract, the Contractor is only entitled to be paid in respect of work where it has been executed in accordance with the Contractor's Design Documents that have been marked, or deemed to be marked, with an 'A' or 'B' in accordance with the Design Submission Procedure at Schedule 1.

The default rate for retention has been reduced from 5% to 3% and there have been some changes in the wording of the retention clauses, but the release of retention is still in the same manner, i.e. half the retention is released on Practical Completion, the other half on the issue of the Certificate of Making Good Defects.

**Valuation of Variations**

Where there has been no pre-agreement as to the consequences of a variation, then under the Standard Building Contract 2005 valuations in respect of variations are either agreed between the Contractor and the Employer or to be determined by the Quantity Surveyor in accordance with the Valuation Rules in the Contract. Under the Design and Build Contract 2005 valuation of the changes are either agreed between the Contractor and the Employer or determined in accordance with the Valuation Rules under the Contract. The Valuation Rules themselves, although their presentation has changed, have not changed in substance.

The primary changes in the Valuation Provisions are as follows:

Under the Design and Build Contract 2005 the alternative 'A' provisions (Contractor's Price Statement) have been omitted apparently because they were little used in practice. This is not surprising as the procedure for agreeing a Contractor's Price Statement could only be initiated by the Contractor and there was little incentive on the Contractor to implement that procedure if the variation could be valued under alternative 'B' in any event once the Works were complete and the Contractor was aware of what costs he had definitely incurred.

That is not to say that under the new Design and Build Contract 2005 there is no ability to pre-agree the consequences of variations. The provisions now appear in Schedule 2 at Clause 4. The provisions have to be activated by an entry in the Contract Particulars and, if activated, my reading of the provisions is that for all instructions which, in the opinion of the Contractor or the Employer, amount to a variation, the Contractor is required to provide:

- an estimate of the adjustment to the Contract Sum;
- the additional resources to comply with the instruction and Method Statement;
- the extension of time required; and
- the amount of direct loss and expense

within 14 days of the date of the instruction unless the Employer states in the instruction, or 14 days thereafter, that estimates are not required.

In relation to the Standard Building Contract 1998, the equivalent provisions for pre-agreeing the consequences of variation are to be found at Clause 13(A). In the 2005 Edition these provisions have also been omitted and replaced at Schedule 2 with what is now known as a "*Schedule 2 Quotation*". The procedure is activated by the Architect/Contract Administrator giving an instruction requiring the Contractor to provide a quotation in accordance with Schedule 2. Time limits are substantially similar to those in Clause 13(A). The content of the Schedule 2 Quotation is expected to comprise:

- the amount of the adjustment to the Contract Sum;
- the adjustment of time required for completion of the Works;
- the amount to be paid in lieu of direct loss and expense; and
- the amount in respect of the cost of preparing the Schedule 2 Quotation.

The Quotation can, if specifically requested in the instruction, also contain information on the additional resources required and method of carrying out the variation. If the Quotation is not accepted, the variation can be instructed in the normal manner, with a valuation in accordance with the Valuation Rules or, alternatively, not proceeded with at all, in which case the Contractor is entitled to be paid for the costs of preparing the Quotation.

The right to claim payment for variations under the Design Submission Procedure is severely limited. If the Contractor believes that compliance with a comment made by the Employer

or Architect would give rise to a variation, he must raise this within 7 days of receipt of the comment or else it is deemed that the comment has not given rise to a variation and consequently the Contractor has lost his rights to valuation of that variation, adjustment to the Completion Date or any loss and expense.

**Adjustment of Completion Date**

Contractors are no longer entitled to an "extension of time". Instead they are entitled to an "adjustment of the Completion Date". The reality is that this is just a change of terminology, although adjustment of the Completion Date does more accurately describe what happens when the Architect/Contract Administrator grants an extension of time. Apart from the changes in terminology and some minor changes to the layout, the procedure is substantially the same.

The list of "Relevant Events" has reduced from the 19 in the JCT 98 Edition to a mere 13 in the 2005 Edition. The reason for this is that Clause 2.29.6 is a "catch all" provision, the wording of which is not dissimilar to the old Clause 25.4.19:

> any impediment, prevention or default, whether by act or omission by the Employer, [the Architect/Contract Administrator, the Quantity Surveyor]* or any of the Employer's persons except to the extent caused or contributed by a default, whether by act or omission of the Contractor or any of the Contractor's Persons
>
> *Words in brackets are only in the Standard Building Contract and not the Design and Build Contract.

The Relevant Events can be roughly split between those that are the responsibility of the Employer, i.e. an Employer default, and those which are the responsibility of persons or things outside the control of the parties. Therefore Clauses 2.29.1 through to 2.29.6. are Employer defaults, for which the Employer is responsible and thereafter Clauses 2.29.7 through to 2.29.13 are events which occur for which the Employer cannot be responsible, but which nevertheless entitle the Contractor to an adjustment of the Completion Date.

**Loss and Expense**

These provisions are contained in Section 4 of the Contracts, which deals with payment, and no longer sit side by side with the "extension of time" provisions. There is, within the Industry, a misconception that an adjustment to the Completion Date and loss and expense go hand in hand and it is necessary to prove an adjustment to the Completion Date in order to obtain loss and expense. In legal terms, however, while the two are connected, they are in fact mutually exclusive remedies and it is not necessary to obtain an extension of time in order to gain loss and expense. Whether divorcing the two provisions so that they are in separate sections of the Contract will alter the Industry's misconception remains to be seen. Provisions relating to loss and expense remain largely unaltered except that the new JCT 2000 Contract refers to "Relevant Matters" rather than the "list of matters" in the 1998 Edition. The Relevant Matters in the new 2005 Edition have equally been reduced from the ten matters that are referred to in the 1998 Edition to five matters. It is fairly easy to cross-reference the Relevant Matters with the Relevant Events to see those events for which the Employer is responsible which give rise to loss and expense.

**Settlement of Disputes**

Anyone who looks at Section 9 of the new 2005 Contracts will be struck by their brevity. The 2005 Contracts now contain 1½ pages of text instead of the previously 4 pages of text. In addition, there is a new provision for mediation, which is by agreement and is not mandatory.

Adjudication is under the Scheme for Construction Contracts and consequently it has been possible to dispense with the extensive provisions relating to adjudication which were contained in the 1998 Contracts. In addition, the parties have the opportunity of naming an adjudicator in the Contract as an alternative to relying upon one of the Nominating Bodies.

There is a provision for arbitration, but it is no longer the default option. The default option is litigation and if the parties wish to have disputes finally resolved by arbitration, they must make the appropriate entry in the Contract Particulars adjacent to Article 8. If the parties make no entry in the Contract Particulars, then disputes will be settled by litigation. Arbitration, if chosen, will be under the JCT Edition of the CIMAR Rules current at the "Base Date", a familiar term for those experienced in the JCT Contracts. The actual date to which Base Date refers is to be entered into the Contract Particulars.

**Conclusion**

The new Editions of the Standard Building Contract and the Design and Build Contract are undoubtedly still complex, but this is hardly surprising as the building projects they are expected to be used on are complex in themselves, as are the legal relationships formed by the parties when carrying out those building projects. The new Editions, however, are more clearly drafted and more easily comprehensible. Redundant provisions have been dispensed with and most of the provisions that relate to a particular aspect of the administration of the project are now logically grouped together in the same Section.

There are still one or two minor irritations, for example the provisions setting out the effect of the Final Certificate are not contained in Section 4, which deals with the issue of the Final Certificate, but instead are contained in Section 1 relating to Definitions and Interpretations. Minor irritations aside, the Contracts have introduced some useful new provisions, such as the Design Submission Procedure and the ability to utilise the Contracts (Rights of Third Parties) Act 1999.

Whilst I have been concentrating on the Standard Building Contract and the Design and Build Contract, the JCT have updated, or are in the process of updating, the entire family of JCT Contracts and Sub-Contracts. Certainly the use of a common format and language in the Sub-Contracts must be an improvement on the current Industry Standard Sub-Contracts, namely DOM1 and DOM2.

On the whole, therefore, I think the revised Editions of the JCT Contracts are an improvement and while that won't prevent Employers amending them, the revised issue should require fewer amendments and should be easier to use than the current 1998 Editions.

**1 November 2005**

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