

# New and updated standard form contracts (UK construction focus)

July 26, 2019

Our latest round-up of new and amended standard form construction contracts.

If you would like any further information on the topics below, please contact one of the team listed under "Key Contacts".

- FIDIC launches its five "Golden Principles" of standard form contracting
- Three new agreements from ACE
- BIM and JCT contracts guidance
- Guidance on VAT reverse charge for building and construction services
- International Construction Measurement Standard updated to include life-cycle costs
- Build UK: contracting practices inhibit spirit of collaboration
- Task force to improve quality and standards

## FIDIC launches its five "Golden Principles" of standard form contracting

The International Federation of Consulting Engineers (FIDIC) launched "The FIDIC Golden Principles (First Edition 2019)" (the Guide) at its Asia Pacific Contract Users' Conference in Hong Kong on 25 June 2019. The Guide arose out of FIDIC's concern that parties are using the Particular Conditions of Contract to make significant amendments to FIDIC conditions. Some changes are so extensive that the final contract no longer represents the FIDIC principles and jeopardises both FIDIC's brand and integrity in the international construction sphere. FIDIC has also noted the recent trend towards employer-friendly Particular Conditions and allocating risk to the contractor.

In response, FIDIC created a special task group (TG15) to protect the integrity of FIDIC contracts, prevent and limit their misuse, and to ensure that tenderers and the public are not misled about what is (and is not) a bona fide FIDIC contract. TG15 identified five Golden Principles which contain the essential characteristics of the general conditions of contract needed to constitute a genuine FIDIC contract. These contractual principles are to be regarded as inviolable and sacrosanct:

1. The duties, rights, obligations, roles and responsibilities of all the contract participants must be generally as implied in the General Conditions, and appropriate to the requirements of the project.
2. The Particular Conditions must be drafted clearly and unambiguously.

3. The Particular Conditions must not change the balance of risk/reward allocation provided for in the General Conditions.
4. All time periods specified in the contract for contract participants to perform their obligations must be of reasonable duration.
5. Unless there is a conflict with the governing law of the contract, all formal disputes must be referred to a Dispute Avoidance/Adjudication Board (or a Dispute Adjudication Board, if applicable) for a provisionally binding decision as a condition precedent to arbitration.

These principles were first introduced in the "Guidance" section of the 2017 FIDIC contracts as an expression of FIDIC's intent. At that point there was no substantive guidance on how they were to be applied. The Guide, which is available as a free download [here](#), goes further: it explains why such principles are "Golden" and addresses how to interpret and apply them in practice.

It remains to be seen whether the Golden Principles will prove enforceable in practice.

## Three new agreements from ACE

The Association for Consultancy and Engineering (ACE) has published three new agreements for 2019:

- The ACE Professional Services Agreement Advisory, Investigatory and other Services 2019 Edition (which updates and replaces Agreement 2) is "for the appointment of a Consultant to undertake any type of services in the built and natural environment except where the Client appointing the Consultant intends to employ a Contractor to construct or install permanent works designed by the Consultant as part of the Services".
- The ACE Professional Services Consumer Agreement 2019 Edition (which replaces ACE Agreement 5 (Homeowner) and is for use in UK jurisdictions) is "for the appointment of a Consultant by a client who is a 'consumer' and recognises current consumer law".
- The ACE Professional Services Agreement Certification of Structural Design 2019 (which updates and replaces Agreement 9 and is for use in Scotland) is "for the appointment of a Consultant for the certification of structural design under the Building Regulations (Scotland) Act 2003 and Building (Scotland) Regulations 2004".

## BIM and JCT contracts guidance

The Joint Contracts Tribunal (JCT) has issued guidance in the form of a practice note (PN) on using JCT contracts on construction projects where Building Information Modelling (BIM) is intended to be used. The PN is intended to supplement the JCT Building Information Modelling, Collaborative and Integrated Team Working Practice Note which was published in January 2016 and is designed to help those new to the concept of BIM.

Through "BIM and JCT Contracts", the JCT aims to promote understanding of BIM-related legal and contractual issues amongst project participants and their professional advisers. The PN also guides on how to approach such issues in a collaborative and constructive way.

The PN consists of a commentary on BIM and the JCT Design and Build Contract 2016 Edition (DB2016). The DB2016 form was chosen as it was understood to be the most popular of the JCT forms for use on a project using BIM. The JCT reminds PN users that JCT forms vary from contract form to form and specialist advice should therefore be obtained when applying this PN to contracts other than the DB2016.

Parties commonly clarify the contractual position relating to BIM by incorporating a BIM Protocol. The PN therefore

includes a BIM Protocol Checklist which lists what to consider when preparing and incorporating a BIM Protocol. Also provided is a checklist of common contents of Exchange Information Requirements.

The JCT intends the PN to be a general guide only. As with all guidance, seek specialist advice on how it applies to specific projects. For more information, see the JCT's podcast on BIM and JCT Contracts [here](#).

## Guidance on VAT reverse charge for building and construction services

The way HMRC collects Value Added Tax (VAT) is scheduled to change on 1 October 2019 when the Value Added Tax (Section 55A) (Specified Services and Excepted Supplies) Order 2019, SI 2019/892 comes into force. The changes are designed to improve the recovery of VAT from suppliers who charge their customers VAT but do not pay it on to HMRC.

The domestic reverse charge will require customers receiving a service to pay the VAT due to the HMRC instead of the supplier. Government guidance on who and what services are affected has been published: "VAT: domestic reverse charge for building and construction services" (which supplements the guidance given in November 2018).

Many in the industry and particular SMEs might experience difficulties in implementing the new VAT system. Indeed, the Federation of Master Builders (FMB) wrote to the government on 16 July 2019 requesting a delay to the date of implementation to give businesses time to prepare. Data published by the FMB shows that "over two-thirds of construction SMEs (69%) have not even heard of reverse charge VAT; and of those who have, more than two-thirds (67%) have not prepared for the changes".

Should the legislation come into force on 1 October 2019 as planned, HMRC has said it may "apply a light touch in dealing with any errors in the first six months of the new legislation". After that, those in default can expect penalties.

Further guidance can be found on the VAT online portal: [www.gov.uk/send-vat-return](http://www.gov.uk/send-vat-return). Our longer commentary on the VAT reverse charge can be found in Construction Law's state of play publication of 1 July 2019 [here](#) (pay wall).

## International Construction Measurement Standard updated to include life-cycle costs

The International Construction Measurement Standards Coalition comprises a group of professionals and organisations collaborating to develop and implement international standards for benchmarking, measuring and reporting construction project costs. Recognising the significant differences in how projects are reported and costed globally, the coalition has developed a common standard for construction measurement which enhances transparency, investor confidence and public trust in the sector.

The Coalition is updating the standard and has been consulting on the International Construction Measurement Standard 2nd Edition, a copy of which can be found [here](#). The update incorporates life-cycle costs which will enable practitioners to classify construction costs across the whole project life cycle.

## Build UK: contracting practices inhibit spirit of collaboration

When Build UK issued its Contract Terms Recommendations on best contractual practices, Mark Castle, Build UK's Chairman and Deputy COO at Mace, said: "We have to face up to the fact that a confrontational, contractual and commercial approach creates myriad inefficiencies and frictions, resulting in a downward spiral of extra costs, lower margins and a further desire to shift risk in a way that is inequitable at best, and unreasonable at worst."

The recommendations identify six terms to improve collaboration, allocate risk more fairly and deliver better project outcomes. They encourage parties to avoid certain clauses relating to fitness for purpose, unquantifiable risks (for example, in relation to asbestos), specified perils, blanket indemnities for breach of contract, uncapped liabilities and performance securities.

These recommendations are not binding on Build UK members – nor could they feasibly be made so. As with all contract negotiations, the parties must collaborate and find the compromise that best suits the project and the parties' interests.

Mark Castle acknowledged it will not be simple to create the necessary "seismic shift in industry performance" to achieve Build UK's stated goals. However, the recommendations create a good starting point for contract negotiations. They might well encourage parties to be more transparent about their needs at the outset and consider carefully what would enhance the parties' working relationship rather than opening negotiations with their usual standard form amendments.

## Task force to improve quality and standards

"In the UK, any person or company is legally allowed to undertake construction work without having to demonstrate a minimum level of competence."

So states the home page of the newly constituted Construction Licensing Task Force. Charged by the government with improving quality and standards and to address the construction industry's poor reputation, the task force is headed up by Liz Peace. It will develop a compulsory licensing scheme for construction. The benefits to which they aspire include:

- remove incompetent and rogue traders from the industry;
- offer a much higher level of consumer protection;
- increase construction output to boost the wider economy;
- drive up quality, professionalism and productivity;
- improve health and safety compliance; and
- improve the image of the industry.

The establishment of the task force follows the research carried out by the Federation of Master Builders (see "Licence to Build: A pathway to licensing UK construction").

For more information on how the above affect your business, get in touch with one of the key contacts.

## Your Key Contacts



**Mark Macaulay**

Partner, Glasgow

D +44 141 271 5691

[mark.macaulay@dentons.com](mailto:mark.macaulay@dentons.com)



**Shaun Tame**

Counsel, Milton Keynes

D +44 207 246 4862

M +44 7585 965 472

[shaun.tame@dentons.com](mailto:shaun.tame@dentons.com)



**Tracey Summerell**

Managing Practice

Development Lawyer,

Milton Keynes

D +44 20 7320 6523

[tracey.summerell@dentons.com](mailto:tracey.summerell@dentons.com)