

JCT '05 & '06 CONTRACTS

What's New and What's Changed

Seminar for the
Chartered Institute of Arbitrators and the
Chartered Institute of Building

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Introduction

- The RICS 'Contracts In Use Survey' of 2004 found that JCT contracts are used in 85% of all construction projects.
- Despite the increasing use of the NEC Form of Contract, the JCT contracts still maintain a lion's share of the market.

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Introduction

- The JCT Standard Form of Contract has a long heritage and this form emanated from the RIBA 1963 form.
- The JCT clauses have been well tested in court, and are familiar to most users.

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Introduction

- Despite this a completely new suite of JCT contracts were published in 2005.
- It is suggested that the forms were produced to counter arguments that the old forms were outdated and were not user friendly. Redrafted using less legalistic language.
- So what is the new suite of contracts all about?

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Introduction

- JCT 2005 contracts published by Sweet & Maxwell not by the RIBA.
- A new 'Digital Service' has been added.
- Useful guides produced by the JCT.

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Introduction

- The new forms have a contemporary appearance.
- The text is sub-divided into sections.
- High degree of consistency and a similar layout in all contracts.

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The Range of Contracts

- The new JCT 2005 suite of contracts is a far more comprehensive suite than its predecessor.
- Main contracts, Sub-contracts, and framework agreements.

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Standard Building Contract (SBC 2005)



- replaces JCT Standard Building Contract (JCT 98).
 - With Quantities [SBC/Q]
 - Without Quantities [SBC/XQ]
 - With Approximate Quantities [SBC/AQ]

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Standard Building Contract (SBC 2005)



- In each case the Private and Local Authority editions have been combined.

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SBC 2005

- for larger works designed and/or detailed by or on behalf of the Employer, where detailed contract provisions are necessary
- Contract Administrator and Quantity Surveyor are to administer the conditions.

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SBC 2005

Can be used:

- where the Contractor is to design discrete part(s) of the works (contractor's designed portion);
- where the works are to be carried out in sections;
- by both private and local authority employers.

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Design & Build Contract (DB)

- **DB 2005** – this contract replaces WCD 1998.



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Design & Build Contract (DB 2005)

- Appropriate:
- where detailed contract provisions are necessary and Employer's Requirements have been prepared and provided to the Contractor.

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Design & Build Contract (DB 2005)

- Appropriate:
- where the Contractor is not only to carry out and complete the works, but also to complete the design; and
- Where the Employer employs an Employer's Agent to administer the conditions.

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Design & Build Contract (DB 2005)

- Can be used:
 - works are to be carried out in sections;
 - by both private and local authority employers.

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Design & Build Contract (DB 2005)

- If Contractor designing small discrete parts of the works and not responsible for completing the design for the whole works, JCT state consideration should be given to using one of the JCT contracts that provide for such limited design input by the Contractor and the employment of a Contract Administrator.

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Intermediate Building Contract 2005 (IC 2005 and ICD 2005)



- Replaces JCT Intermediate Form of Contract 1998.
 - Intermediate Building Contract [IC]
 - Intermediate Building Contract With Contractor's Design [ICD]

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IC 2005 / ICD 2005

- more detailed provisions and more extensive control procedures than the Minor Works Building Contract (MW) but less detailed than the Standard Building Contract (SBC).
- Contract Administrator and Quantity Surveyor are to administer the conditions.

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IC 2005 / ICD 2005

Can be used:

- where the proposed building works are of a simple content involving the normal, recognised basic trades and skills of the industry, without building service installations of a complex nature or other complex specialist work.

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IC 2005 / ICD 2005

Can be used:

- where the Contractor is to design discrete part(s) of the works (contractor's designed portion);
- where the works are to be carried out in sections;
- by both private and local authority employers.

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IC 2005 / ICD 2005

Can be used:

- where provisions are required to cover named specialists.

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IC 2005 / ICD 2005

- Not suitable as a design and build contract.

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Minor Works Building Contract 2005 (MW 2005 and MWD 2005)



- **MW 2005** – this contract replaces MW 1998.
 - Minor Works Building Contract [MW]
 - Minor Works Building Contract With Contractor's Design [MWD]

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Minor Works Building Contract 2005 (MW 2005 and MWD 2005)



- Also NEW:
 - Minor Works Building Contract with Contractor's Design (MWD 2005)
 - Design Portion only i.e. Contractor to design discrete part(s) of the works, not all of the Works.

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Minor Works Building Contract 2005 (MW 2005 and MWD 2005)



- Also NEW:
 - Minor Works Building Contract with Contractor's Design (MWD 2005)
 - Design Portion only i.e. Contractor to design discrete part(s) of the works, not all of the Works.

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MW 2005 / MWD 2005

- Less detailed provisions and less extensive control procedures than the Intermediate Building Contract 2005 (IC 2005).
- Contract Administrator is to administer the conditions.

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MW 2005 / MWD 2005

Can be used:

- where the work involved is simple in character.

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MW 2005 / MWD 2005

Can be used:

- where the Contractor is to design discrete part(s) of the works (contractor's designed portion);
- by both private and local authority employers.

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MW 2005 / MWD 2005

Not suitable;

- as a design and build contract.
- Where bills of quantities are required.
- Where named specialists are required.
- Where detailed contract procedures are needed.

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The Range of Contracts

- Constructing Excellence Contract - 2006 [CE]

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The Range of Contracts

- Constructing Excellence Contract - [CE]
- Major Project Construction Contract [MP]
- Construction Management Appointment [CM/A]
- Management Building Contract [MC]

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The Range of Contracts

- Prime Cost Building Contract [PCC]
- Measured Term Contract [MTC]
- Framework Agreement [FA]
- Non-binding [FA/N]

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The Range of Contracts

- Building Contract for a home owner/occupier
 - who has not appointed a consultant to oversee the work [HO/B]
 - who has appointed a consultant to oversee the work [HO/C]
- Home Repair and Maintenance Contract [HO/RM]

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The Range of Sub-Contracts

- Standard Building Sub-Contract [SBCSub]
- Standard Building Sub-Contract with sub-contractor's design [SBCSub/D]

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The Range of Sub-Contracts

- Intermediate Sub-Contract [ICSub]
- Intermediate Sub-Contract with sub-contractor's design [ICSub/D]
- Intermediate Named Sub-Contract [ICSub/NAM]

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The Range of Sub-Contracts

- Design and Build Sub-Contract [DBSub]

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The Range of Sub-Contracts

- Short Form of Sub-Contract [ShortSub]
- Major Project Sub-Contract [MPSub]
- Sub-subcontract [SubSub]

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The appropriate JCT contract.

- The JCT has issued a 'Practice Note' entitled 'Deciding on the appropriate JCT contract'. This is recommended reading.

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Changes of form or style

- Each of the contracts have been restructured.
- The Articles of Agreement are found at the beginning of the contract and these contain the contract specific information in the Recitals, Articles and the Contract Particulars.
- There is no separate Appendix as in the 1998 forms.

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Changes of form or style

- The Conditions have been restructured and grouped into sections.
- In many instances, the running order of the clauses has been changed. The first consequence of this is that familiar clauses will need to be tracked down.

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Changes of form or style

- Several of the more popular supplements that JCT published as separate documents are now included within certain of the standard forms. For example, SBC 2005 gives the user the option (which needs to be activated by filling in relevant Contract entries) for Sectional Completion, Collateral Warranties, and a Contractor's Designed Portion.

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Greater clarity at the outset.

- The contracts are more complete in their standard form – less requirement to purchase separate supplements.
- A thorough set of Articles of Agreements including Contract Particulars which resolve to default positions.

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Standard Building Contract (SBC 2005)



- replaces JCT Standard Building Contract (JCT 98).
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SBC 2005 - Changes of form or style

- The Conditions have been restructured and grouped into nine sections and seven schedules.
- Section 1 – Definitions and Interpretation
- Section 2 – Carrying out the Works
- Section 3 – Control of the Works
- Section 4 – Payment
- Section 5 – Measurement and Valuation

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SBC 2005 - Changes of form or style

- Section 6 – Injury, Damage and Insurance
- Section 7 – Assignment, Third Party Rights and Collateral Warranties
- Section 8 – Termination
- Section 9 – Settlement of Disputes

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SBC 2005 - Changes of form or style

- Schedule 1 Contractor's Design Submission Procedure
- Schedule 2 Schedule 2 Quotation
- Schedule 3 Insurance Options
- Schedule 4 Code of Practice
- Schedule 5 Third Party Rights
- Schedule 6 Forms of Bonds
- Schedule 7 Fluctuations Options

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SBC 2005 –Main Changes

- Article 8: Arbitration
- Article 9: Legal Proceedings
- Default position is now Legal Proceedings not Arbitration.
- If Arbitration is required, the Contract Particulars must be amended.

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SBC 2005 – Main Changes

- Sixth Recital
- Description of Sections.
- The description of the Sections must be shown or the relevant drawings referenced.
- The 1998 Sectional Completion Supplement has largely been adopted wholesale to provide this option.

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SBC 2005 – Main Changes

Clause 2.26 to 2.29
Adjustment of Completion Date rather than Extension of Time.
Reason for Change of name;
The SBC 2005 guide states the name is
“..more open recognition of agreement to accelerate the Works, in accordance with the Schedule 2 quotation procedure”

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SBC 2005 – Main Changes

- Clause 2.28
- Fixing Completion Date
- The CA is to provide a response to each notice for an adjustment to the Completion Date from the Contractor
- The CA's response is to state the period of time he has awarded against each Relevant Event and Relevant Omission.

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SBC 2005 – Main Changes

- Relevant Events out are;
 - Failure to comply with the Information Release Schedule
 - Delay on the part of a Nominated Sub-Contractor or Nominated Supplier
 - The execution of work by the Employer or supply of goods by them

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SBC 2005 – Main Changes

- Further Relevant Events out are;
 - The Contractor’s inability to secure labour, goods and materials.
 - Failure of the Employer to allow access
 - Changes in statutory requirements

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SBC 2005 – Main Changes

- New Relevant Event “Sweeper clause”;
“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 to by any default, whether by act or omission, of the Contractor or of any of the Contractor’s Persons”.

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SBC 2005 – Main Changes

- Sub-letting
- The prime change here is the demise of the provision for Nominated Sub-Contracting.
- Clause 3.9. Conditions of Sub-letting. This clause is a list of terms that the Contractor must apply to any work he sub-lets. There is a major change in that clause 3.9.4 accommodates the new process for the provision of collateral warranties.

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SBC 2005 – Main Changes

- Clause 4.19
- Retention Bond
- This clause provides for the option of a Retention Bond as an alternative to deducting retention from the Contractor's payments.

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SBC 2005 – Main Changes

- Clause 4.20.1
- Retention Percentage
- The default Retention Percentage is now 3% not 5%.

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SBC 2005 – Main Changes

- Clause 4.24
- Loss and Expense – Relevant Matters
- Relevant Matters updated and shortened from 11 matters (JCT '98) to 5 matters (JCT 2005). This includes new 'sweeper' clause 4.24.5 (same as clause 2.29.6)

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SBC 2005 – Main Changes

- Clause 6.11
- Contractor's Designed Portion
- Like JCT '98, SBC 2005 is a contract for which the Employer is expected to employ its own design team.
- However, unlike JCT '98, SBC 2005 is supplied with a facility for an element of design work to be carried out by the Contractor – the Contractor's Designed Portion.

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SBC 2005 – Main Changes

- Clause 6.11
- Contractor's Designed Portion
Professional Indemnity Insurance
- State the value of PI insurance that the Contractor must carry in respect of the CDP.
- If no value is inserted then no PI insurance will need to be provided by the Contractor.

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SBC 2005 – Main Changes

Clause 9.1 – Mediation

- The contract has a new clause that suggests that the parties consider the mediation of disputes.
- It is not an obligation that they must do so, nor that they must even consider doing so.

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SBC 2005 – Main Changes

Clause 9.2 – Adjudication

- The adjudication process has now changed and will now be carried out under the rules of the ‘Scheme’ (slightly amended) rather than the JCT’s own rules.

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SBC 2005 – Main Changes

Clause 9.2 – Adjudication

- The contract provides that the Parties may nominate a specific individual in the Contract Particulars to act as Adjudicator.

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SBC 2005 – Main Changes

Clause 9.2 – Adjudication

- If the Contract Particulars have not been completed, then a Referring Party may select any of the Adjudicator Nominating Bodies.
- The previous default position of the RIBA being the ANB no longer exists.

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Design & Build Contract (DB)

- **DB 2005** – this contract replaces WCD 1998.



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DB 2005 – Main Changes

- Health and Safety Plan
- Clause 3.18.
- The main change is that DB 2005 adds the new express obligation that the Principal Contractor is to develop and then issue the Health and Safety Plan to the Employer before construction begins.

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DB 2005 – Main Changes

- Clause 4.10
- Interim Certificates - Payment
- Payment period from the date of receipt of the Application for Interim Payment.
- Period for payment notice and withholding notice both remain at 5 days. Payment notice not later than 5 days after date of receipt of the Application for Interim Payment.
- Withholding notice not later than 5 days before final date for payment

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DB 2005 – Main Changes

- Clause 4.10.5 – Amount of Payment
- Under WCD 1998, if the Employer failed to issue any notice before withholding sums, then clause 30.3.5 provided that the Employer was to pay the amount stated in the Contractor's Application for Interim Payment.

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DB 2005 – Main Changes

- Clause 4.10.5 – Amount of Payment
- Under DB 2005, if the Employer fails to issue the requisite withholding notice, the contract provides that the Employer is to pay "the amount due ... as determined in accordance with clause 4.8"

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DB 2005 – Main Changes

- Clause 5.4
- Measurable Work
- An extra sub-clause has been added to DB 2005 in comparison to WCD 1998 as clause 5.4.1 and this provides that:
"Allowance shall be made in such Valuations for the addition or omission of the relevant design work"

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JCT DB 05 - Design Issues

Clause 2.8 – Construction Information.

- This clause requires the Contractor to comply with the new Contractor's Design Submission Procedure.

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Contractor's Design Submission Procedure

- The contractor must submit all design documents that it prepares for review.
- Following such a review (14 days), design documents are returned to the Contractor graded as follows:

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Contractor's Design Submission Procedure

"A" – contractor to proceed with the works in accordance with the design document. Note: default position - a design is deemed to have been marked "A" in the event that it is not returned within 14 days of submission;

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Contractor's Design Submission Procedure

"B" – contractor proceed with the works in accordance with architect/employer comments. Design must also be amended to take on board such comments;

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Contractor's Design Submission Procedure

"C" – contractor to resubmit design document incorporating comments made. No works to be carried out.

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Contractor's Design Submission Procedure

- A contractor is only entitled to be paid in respect of such work where it has been executed in accordance with designs marked A or B.
- Are comments a variation? The Contractor must challenge in 7 days. If not will be deemed not to constitute a variation.
- If challenged, the Employer is required to respond within 7 days.

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Contractor's Design Submission Procedure

Users should not mistake this process for a full vetting or approval process.

Clause 8.3 of Schedule 1 provides that:

"... neither compliance with the design submission procedure in this Schedule nor with the Employer's comments shall diminish the Contractor's obligations to ensure that the Contractor's Design Documents and Works are in accordance with this Contract."

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JCT DB 05 - Design Issues

Clause 2.11 – Preparation of Employer's Requirements.

- 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.

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JCT DB 05 - Design Issues

Clause 2.17 – Liabilities and limitation.

- 2.17.1. Contractor has same liability as an Architect (i.e. reasonable skill and care)
- 2.17.2. Where work is in respect of dwellings, the Contractor also has liability under the Defective Premises Act 1972.

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Third Party Rights

- The Third Party must be expressly identified in the contract –
- by name; or
- as a member of a class; or
- as answering a particular description
- but need not be in existence when the contract was entered into.

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Third Party Rights

- Third Party Rights Under the JCT Design and Build 2005
- The Contract provides at 1.6 in respect of the Contracts (Right of Third Parties) Act 1999 that:
- “Other than such rights of any Purchasers, Tenants and/or Funder as take effect pursuant to clauses 7A and/or 7B, nothing in this Contract confers or is intended to confer any right to enforce any of its terms on any person who is not party to it.”

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Third Party Rights

Clauses 7A to 7E – Third Party Rights

- The rights themselves are set out in Schedule 5 and may either take the form of collateral warranties or alternatively by adoption of the Contracts (Rights of Third Parties) Act 1999. Details to be set out in Part 2 of the Contract Particulars.

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Third Party Rights

Clauses 7A to 7E – Third Party Rights.

- In addition to the rights that the Purchaser and Tenant may have against the Contractor, provision is made for collateral warranties to be provided by sub-contractors and professionals to third parties. The terms are substantially similar to existing JCT documents that had previously been published as supplements.

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Intermediate Building Contract 2005 (IC 2005)



- Replaces JCT Intermediate Form of Contract 1998.

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IC 2005 – main changes

- All project specific information now in one place at the front of the document in a new section called the 'Contract Particulars'
- IFC 98 placed much of this information in the Appendix (at the end of the contract) but it was also in the Recitals, Articles and the main text.

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IC 2005 – main changes

- Eighth Recital
- IC 2005 provides for the option of the Works being divided into, and provided, in Sections. The necessary changes are found throughout document.
- If the contract is to be carried out in Sections, then this should be noted in detail in the Contract Particulars.

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IC 2005 – main changes

- Clause 4.7.1 – Amount of retention
- Retention remains at 5% unless amended by the parties.

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IC 2005 – main changes

- Collateral Warranties
- Clause 7.5. Purchasers and Tenants. If Purchaser and Tenant rights are required, then this requirement is to be stated in part 2 of the Contract Particulars before the contract is executed.
- Clause 7.6. Funder. If Funder rights are required, then this requirement is to be stated in part 2 of the Contract Particulars before the contract is executed.

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IC 2005 – main changes

- Collateral Warranties
- Clause 7.7 and 7.8
- Sub-Contractor’s Warranties for Purchasers and Tenants / Funder / Employer.
- If the Employer requires Sub-Contractor collateral warranties in respect of the above, this requirement is to be stated in part 2 of the Contract Particulars before the contract is executed.

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IC 2005 – main changes

Clause 8.5

- Insolvency of Contractor
- Notice must be given to the Contractor by the Employer if he wishes to terminate the contract in the event of the Contractor’s insolvency.
- In the past termination (or rather determination) was automatic upon insolvency.

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IC 2005 – main changes

Clause 8.9.2

- Termination by Contractor (default by Employer)
- The Parties may now state how long must pass before the contract can be terminated on the grounds of suspension.
- The default time period for suspension has been increased from one month to two months for IC 2005.

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IC 2005 – main changes

Clause 8.11

- Termination by either party
- IC 2005 requires the Parties to state their own period in the Contract Particulars but provides a two-month default period in the event that they fail or opt not to state a period.

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IC 2005 – main changes

Clause 8.12

- Consequences of Termination
- If terminated under clauses 8.9 to 8.11 (i.e. termination by Contractor or termination by either party) the Contractor is to draw up the account.
- Under IFC '98 it was always the party terminating that drew up the account.

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IC 2005 – significant items that have not changed

- Named Sub-Contractors
 - The contract retains a method of appointing a Named Sub-Contractor. This is found in Schedule 2.
 - The processes set out in the contract are substantially unchanged in comparison to IFC 1998.

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ICD 2005 – main changes

- Clauses 2.34 - CDP.
 - 2.34.1 – Design standard – reasonable skill and care.
 - 2.34.2 – Defective Premises Act 1972
 - 2.34.3 – Liability limited to amount stated in Contract Particulars
 - 2.34.4 – Contractor not liable for Employer's design (other than Statutory Requirements)

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Minor Works Building Contract 2005 (MW 2005)



- **MW 2005** – this contract replaces MW 1998.

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MW 2005 – main changes

- Clause 3.3 – Sub-letting.
- This is a new sub-clause that provides for the termination of any sub-contracts that the Contractor may have entered into on the termination of the main contract.

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MW 2005 – main changes

Clause 3.5 – Non-compliance with instructions

- Under MW 2005 the Employer may then instruct another Contractor to carry out 'any work whatsoever which may be necessary to give effect to the instruction.'
- Under MBW 1998 this was more limited to another Party carrying out 'the work' that was subject to the unimplemented instruction.

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MW 2005 – main changes

Clause 6.3.2.

- Reinstatement after termination.
- This clause is a statement that the parties may agree to a reinstatement.
- The parties are not obliged to consent, or indeed respond, to a suggestion of reinstatement, either in this contract or in law.

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MW 2005 – main changes

Clause 6.7.1.

- Consequence of termination.
- This clause also provides for a right for the Employer to use all Site Materials, although, the Employer is still obliged to seek third party consents where relevant (e.g. in the case of rented plant and accommodation).

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MW 2005 – main changes

Clause 6.7.3 and 6.7.4

- Consequence of termination.
- There is now an obligation on the Employer to compile an account that records the costs associated with the project at the end of a contract terminated due to the Contractor's default. Clause 6.7.4 says how the account is to be compiled.

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MW 2005 – main changes

Clause 6.10

- Termination by either party
- This clause brings in a right of termination for either party. The circumstances for such termination might be generalised as 'events that are beyond the control of the parties' that cause a continuous suspension of the Works for more than one month.

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MW 2005 – main changes

Clause 6.11

- Consequences of termination under 6.8 to 6.10
- The specific changes to the process of MBW 1998 is that clause 6.11.2.2 of the contract now provides that the Contractor can submit the cost of goods he is legally obliged to pay for, whereas MBW 1998 only permitted this for materials on site.

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**JCT CONSTRUCTING EXCELLENCE
CONTRACT 2006**

- CE 2006 is intended to:
 - encourage collaborative behaviour
 - incorporate risk management
 - provide flexibility in use
 - be used throughout the supply chain

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**JCT CONSTRUCTING EXCELLENCE
CONTRACT 2006**

- CE 2006 consists of two documents.
 - a Contract, comprising the Conditions, bi-party Agreement, and Contract Particulars.
 - a Project Team Agreement.

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**JCT CONSTRUCTING EXCELLENCE
CONTRACT 2006**

- The Project Team Agreement in CE 2006 is a multi-party document which supplements the individual bi-party contracts and can be entered into once the project team has been established.
- The Project Team Agreement sets out the role of the Project Team and allows for the sharing of risk by a pain / gain incentive.

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**JCT CONSTRUCTING EXCELLENCE
CONTRACT 2006**

- The key features of CE 2006 are:
- flexibility – either for a one-off project or for a series of projects.
- can be used by all tiers, as parties are referred to as the “Purchaser” and the “Supplier”.
- Similarly, the phrase “Services” is used to cover building works or professional services.

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**JCT CONSTRUCTING EXCELLENCE
CONTRACT 2006**

- The key features of CE 2006 are:
- it allows for design obligations, and alternative standards of care for design.
- it makes provision for a Risk Register.
- a Risk Allocation Schedule is part of the Agreement.

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**JCT CONSTRUCTING EXCELLENCE
CONTRACT 2006**

- The key features of CE 2006 are:
- Performance Indicators can be set out.
- alternative payment options (e.g. target costs, or a contract sum etc.)
- no provision for arbitration, but disputes may be resolved by mediation, adjudication or litigation.

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**JCT CONSTRUCTING EXCELLENCE
CONTRACT 2006**

- The Overriding Principle in operating the individual contracts is that the Purchaser and Supplier must work together with each other and all other project participants in a co-operative and collaborative manner in good faith and in the spirit of mutual trust and respect.
- Does the fact that a contract require this make it more likely that this will happen?

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**JCT '05 & '06 CONTRACTS
What's New and What's Changed**

QUESTIONS ???

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