

Construction Law Training – Session 3

Extensions of Time, Loss and Expense and Insurance



Presenter

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Senior Partner

Andrew used to be an engineer. After requalifying as a lawyer he spent time at a leading City firm before establishing an industry-leading construction team at large regional firm and becoming a member of the Legal 500 'Hall of Fame' in the process. His background allows him to get to the root of the issue and provide pragmatic commercial advice alongside specialist construction legal advice.

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Hanna McNab

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Most of Hanna's work involves disputes, but she is equally adept working on contract documents, giving ad hoc advice, and providing training. Hanna is queen of the escrow agreement, is involved with all sorts of industry bodies and committees, and, most importantly, is our Social Secretary (an honour she prizes above all others). Legal 500 has said Hanna is "on course for a very successful career". Hopefully that career is in law.

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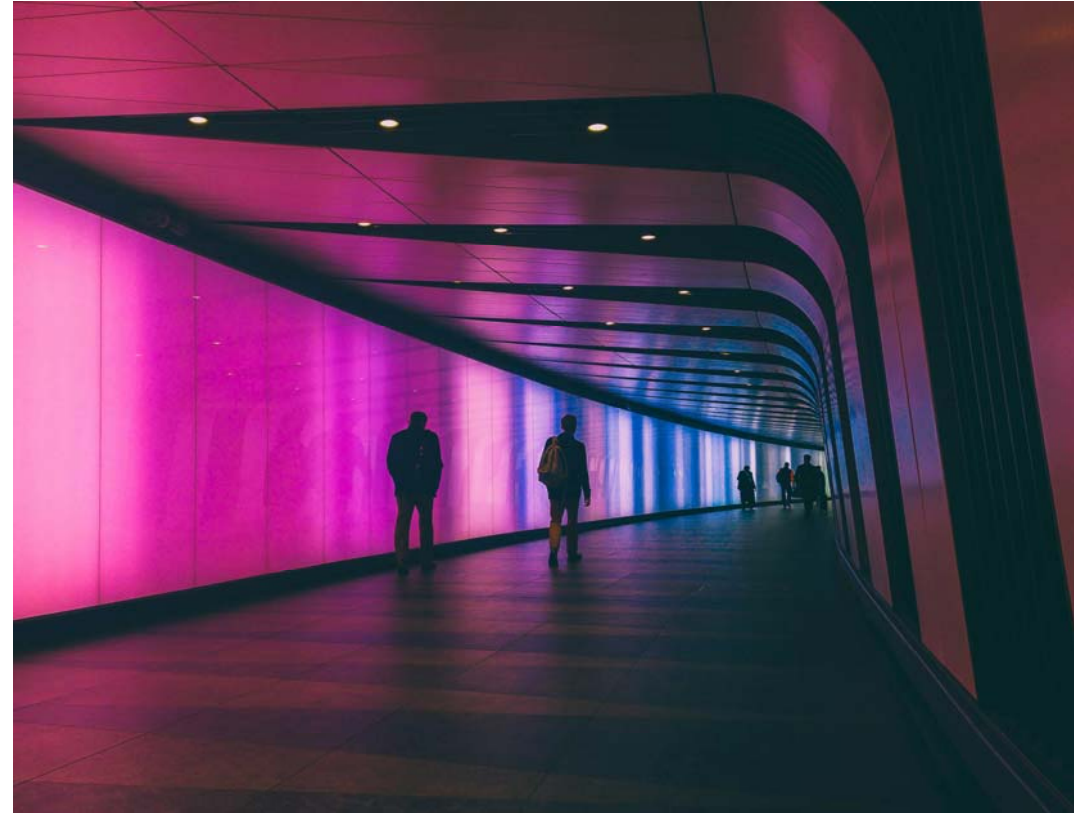


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Session 3

1. Extensions of time
2. Loss and expense
3. Insurance



Part 1 – Extensions of Time

What is an extension of time (EOT)?

- All construction contracts (should!) have a completion date / period to complete
- All construction contracts must (but sometimes don't!) have a right to alter the completion date if certain events arise **AND** such event(s) cause a delay to the completion date
- The mere fact an event occurs (whether it is a specified/relevant event or not) does not automatically make it a delay event
- Each contract is different

Why do you need an EOT?

- I don't need one – the Employer's Agent has told me we'll sort it out at the end of the project and it will be fine!
- But what about:
 - Relief from liquidated damages?
 - Entitlement to loss and expense?
- Profit margin per job

**I am very
cautious of
people whose
actions don't
match their
words.**

ANCHOR
ALEX TELE

How does JCT deal with EOTs?

2.25 Fixing Completion Date

2.25.1 If on receiving a notice and particulars under clauses 2.24.1 and 2.24.2 or (where applicable) a notification under clause 2.24.3:

2.25.1.1 any of the events which are stated to be a cause of delay is a Relevant Event;
and

2.25.1.2 completion of the Works or of any Section is likely to be delayed thereby beyond the relevant Completion Date,

then, save where these Conditions expressly provide otherwise, the Employer shall give an extension of time by fixing such later date as the Completion Date for the Works or Section as it then estimates to be fair and reasonable.

Relevant Events

Relevant Events

- Changes (i.e. variations) (clause 2.26.1)
- Employer impediment (clause 2.26.6)
- Late receipt of permissions (clause 2.26.14)
- Often deleted:
 - Exceptionally adverse weather (clause 2.26.10)
 - Loss or damage caused by Specified Perils (clause 2.26.11)
 - Civil commotion (clause 2.26.12)
 - Delay in permission from statutory body (clause 2.26.14)



Relevant Events – JCT Update for 2024

- Asbestos (clause 2.26.4)
- Epidemic (clause 2.26.7)
- Statutory Requirements/powers (clause 2.26.8)



Long live the King! *And can I have an EOT please ...*

- Relevant Events
 - Client events – prevention / access / variations
 - Neutral events – weather / **COVID** / Bank Holidays?
 - Contractor events – lack of labour / **materials delays?**
- Relevant Matters
 - Client events (or third party events (e.g. Development Control Requirements))



Delay

Assessing Delay

- SCL Delay and Disruption Protocol (2nd Edition)
- 6 methods of analysis
- All methods require identification of the critical path

critical path

The longest sequence of activities through a project network from start to finish, the sum of whose durations determines the overall project duration. There may be more than one critical path depending on workflow logic. A delay to progress of any activity on the critical path will, without acceleration or re-sequencing, cause the overall project duration to be extended, and is therefore referred to as a 'critical delay'.



Assessing Delay – Example

- Nuclear power plant
- Nearby house
- Critical delay?



Assessing Delay – Prospectively or Retrospectively?

- How to determine delay impact?
 - Prospective delay analysis
 - Retrospective delay analysis

Concurrent Delay

- *“...the occurrence of two or more delay events at the same time, one an Employer Risk Event, the other a Contractor Risk Event, and the effects of which are felt at the same time.”*
- One employer delay – e.g. variations
- One contractor delay – e.g. lack of labour
- *“There is only concurrency if both events in fact cause delay to the progress of the works and the delaying effect of the two events is felt at the same time... The act relied upon must actually prevent the contractor from carrying out the works within the contract period, or, in other words, must cause some delay.”*

Notification requirements

JCT – Notification Requirements

2.24 Notice by Contractor of delay to progress

- 2.24.1 If and whenever it becomes reasonably apparent that the progress of the Works or any Section is being or is likely to be delayed the Contractor shall forthwith give notice to the Employer of the material circumstances, including the cause or causes of the delay, and shall identify in the notice any event which in its opinion is a Relevant Event.
- 2.24.2 In respect of each event identified in the notice the Contractor shall, if practicable in such notice or otherwise in writing as soon as possible thereafter, give particulars of its expected effects, including an estimate of any expected delay in the completion of the Works or any Section beyond the relevant Completion Date.
- 2.24.3 The Contractor shall forthwith notify the Employer of any material change in the estimated delay or in any other particulars.
- 2.24.4 If, on receiving the particulars under clause 2.24.2, or any notification under clause 2.24.3, the Employer requires such further information as is reasonably necessary to enable it to reach a decision under clause 2.25.1, then, not later than 14 days from receipt of the particulars or notification, it shall notify the Contractor stating the further information required, and the Contractor shall supply such further information.

Is there a required form of notice?

- In a form that can be read, copied and recorded:
 - Writing
 - E-mail
 - WhatsApp?
- Contractual notice clauses
- Be wary of contractual notice clauses relating to project software
- Don't rely just on meeting minutes

Condition precedent clauses

- What is a condition precedent clause?
 - Requires an action
 - In a specified period
 - Relates to a contractual right
 - Lose right if fail to comply
- What do they cover?
 - Payment
 - Variations
 - EOTs



Common Amendment

- *“If and whenever it becomes apparent that the progress of the Works or any Section is being or is likely to be delayed the Contractor shall forthwith **and in any event not later than 28 days** give notice to the Employer of the material circumstances, including the cause or causes of the delay, and shall identify in the notice any event which in its opinion is a Relevant Event. **It shall be a condition precedent to the Contractor receiving any extension of time that the Contractor has served the notice referred to in accordance with this clause. For the avoidance of doubt if the Contractor fails to serve a notice in accordance with this clause they shall lose any entitlement to such extension of time.**”*

Is it a valid condition precedent clause?

- What do the words say?
- Is there a clear time limit?
- Do you lose your entitlement?
- NB: does not need to say “condition precedent”



When do you have to claim?

- What do the standard forms say?
 - JCT – forthwith (not a CP)
 - NEC – 8 weeks/7 weeks (is a CP)
 - IChemE – as soon as possible (not a CP)
 - ICC – 28 days (arguably a CP)
- **BUT – READ THE CONTRACT**
 - Clauses often amended
 - Limited period for notice



Common myths

Common myths

- Time is at large
- “Exceptionally” adverse weather*
- Delay by Statutory Providers

*Let it Snow! Let it Snow! Let it Snow!



Time at large?

- *“Coz there have been so many changes time’s at large mate so I can finish when I like!”*
- **NO**
- Prevention principle



Time at large

- What does the phrase mean?
 - No date fixed / agreed time period set for completion of the works; or
 - Such times and dates as agreed can no longer apply

When is time NOT at large?

- Just because:
 - You have lots of variations
 - It is difficult to assess an EOT
 - The EA / CA / PM hasn't given you what you want



Time at large – the court's view

- Multiplex Construction (UK) Ltd –v- Honeywell Control Systems Ltd (No. 2) (2007) EWHC 447 (TCC)
 - Mr Justice Jackson (at para 56 (ii)):
 - *“Acts of prevention by an employer do not set time at large, if the contract provides for extension of time in respect of those events.”*

What if time is at large?

- Works need to be completed in “reasonable time”
- No right to deduct liquidated damages
- BUT have a right to fall back on general damages

Exceptionally adverse weather

- Is it windy in January?
- Does it rain in August?
- Is it frosty in April?
- Is a contractor entitled to an EOT for:
 - Being unable to use a crane in January?
 - Being unable to lay bricks in August?
 - Being unable to pour concrete in April?
- NEC / ICC / IChemE



Delay by Statutory Providers

2.26.97 the carrying out by a Statutory ~~Provider Undertaker~~ of work in pursuance of its statutory obligations in relation to the Works, or the failure to carry out such work;

Statutory Provider: any person executing work solely in pursuance of its statutory obligations, including any persons employed, engaged or authorised by such person upon or in connection with that work.

~~**Statutory Undertaker:** any local authority or statutory undertaker where executing work solely in pursuance of its statutory obligations, including any persons employed, engaged or authorised by it upon or in connection with that work.~~

Delay by Statutory Providers

- Who contracted with the Statutory Provider?
 - Employer?
 - Contractor?
- Is it a contractual obligation?
- Is it a statutory obligation?

Delay by Statutory Providers – Case Law

- Henry Boot v Central Lancashire (1980) 15 BLR 1
- It was held that, where statutory undertakers were doing their work because they had contracted with the Employer or Contractor, the delay did not fall under “the statutory undertaker” Relevant Event.
- They will be carrying out work pursuant to the contract and not in pursuance of statutory obligations.
 - If they are engaged by the Employer, “Employer prevention” may apply.
 - If they are engaged by the Contractor, the delay will be at the Contractor’s risk.
- Jerram Falkus v Fenice Investments [2011] EWHC 1935 (TCC)
 - a “Statutory Undertaker” is not an “Employer’s Person”
 - EDF / British Gas were appointed pursuant to contracts

Delay by Statutory Providers

- What is the answer?
- Does a contractor get an extension of time if a Statutory Provider causes delay?
- Typical position for electricity / gas:
 - Contractor enters into contract with Statutory Provider
 - Client required to contract with Statutory Provider for “meters”
- Electricity supplier [EDF?] is a Statutory Provider
- Work is not “*in pursuance of its statutory obligations*”
- **Answer = NO**

Part 2 – Loss and Expense

Loss and Expense

4.19 Matters materially affecting regular progress

4.19.1 If in the execution of this Contract the Contractor incurs or is likely to incur any direct loss and/or expense as a result of any deferment of giving possession of the site or part of it under clause 2.4 or because regular progress of the Works or any part of them has been or is likely to be materially affected by any Relevant Matter, it shall, subject to clause 4.19.2 and compliance with the provisions of clause 4.20 be entitled to reimbursement of that loss and/or expense.

- Deferment of possession
- Relevant Matter
- Cost claim
- Notification

Relevant Matters

Relevant Matters

- Not all Relevant Events are Relevant Matters
- 7 Relevant Matters BUT commonly amended
- JCT 2024 updated Relevant Matters (mirror Relevant Events)

Direct loss and/or expense

What can be claimed?

- Direct loss and/or expense:
 - On site preliminaries
 - Off site overhead/preliminaries
 - Loss of profit
 - Inflation costs
 - Interest/finance costs
 - Loss of contribution to head office overheads
- Cost claim – Contractor must prove!

Notification requirements

JCT – Notification Requirements

4.20 Notification and ascertainment

- 4.20.1 The Contractor shall notify the Employer as soon as the likely effect of a Relevant Matter on regular progress or the likely nature and extent of any loss and/or expense arising from a deferment of possession becomes (or should have become) reasonably apparent to it.
- 4.20.2 That notification shall be accompanied or, as soon as reasonably practicable, followed by the Contractor's initial assessment of the loss and/or expense incurred and any further amounts likely to be incurred, together with such information as is reasonably necessary to enable the Employer to ascertain the loss and/or expense incurred.
- 4.20.3 The Contractor shall thereafter, in such form and manner as the Employer may reasonably require, update that assessment and information at monthly intervals until all information reasonably necessary to allow ascertainment of the total amount of such loss and expense has been supplied.
- 4.20.4 Within 28 days of receipt of the initial assessment and information and 14 days of each subsequent update of them the Employer shall notify the Contractor of the ascertained amount of the loss and/or expense incurred, each ascertainment being made by reference to the information supplied by the Contractor and in sufficient detail to enable the Contractor to identify differences between it and the Contractor's assessment.

Part 3 – Insurance

Why insure?

- Protection?
- Allocation of risk?
- Requirement to insure
- Self insure?



Insurance under JCT

- Smorgasbord of acronyms!
 - EL
 - PL
 - 6.5.1 (NNI)
 - PI
 - MUI
 - CAR



Required Insurance under JCT

- 6.1 – Personal Injury or Death – Scope of Contractor's liability [Third Party / Employer's Liability]
- 6.2 – Damage to Property – Scope of Contractor's liability [Third Party Property (not new build)]
- 6.5.1 - Insurance (Non-negligent Insurance) [Was Clause 21.2.1 insurance]
- 6.15 - Professional Indemnity Insurance
- 6.20 – Joint Fire Code
- 6.7/6.8/6.9 - Contractors All Risks Insurance (includes Terrorism) - Schedule 3 (Option A, B and C)

Employer's Liability

- Protects employees
- Requirement for most employers
- Mandatory, but mentioned in JCT



Public Liability / Third Party Liability

- Public liability insurance (PL) = Third Party Insurance
- Covers:
 - death or personal injury to third parties.
 - damage to property belonging to third parties
- Does not cover damage to property relating to the Contract – see clause 6.3.4
- PL is on an 'events occurring' basis



Public Liability / Third Party Liability

6.4.1

Contractor's Public Liability insurance: injury to persons or property – the required level of cover is not less than

£ _____
for any one occurrence or series of occurrences arising out of one event

- Typical value = £5m or £10m
- Rail related work? £155m

WHY?

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Non-Negligent Insurance

- Normally required with large basement works excavated in close proximity to other buildings
- Possibly relevant on extensions to care homes
- It can be a part of an 'all risk policy', but it needs to be specifically requested.
- Consider if required?



Non-Negligent Insurance

6.5.1

Insurance – liability of Employer

Minimum amount of indemnity for any one occurrence or series of occurrences arising out of one event⁽²⁰⁾

£ _____



Professional Indemnity Insurance

- Professional negligence
- What does it cover? Negligent design, services and specification
- Required from a design contractor and any design sub-contractors or professional consultants
- 'Claims made basis'
- Maintain for entire period of liability

Professional Indemnity Insurance

6.15

Professional Indemnity insurance^[23]

Level of cover

(If an alternative is not selected the amount shall be the aggregate amount for any one period of insurance. A period of insurance for these purposes shall be one year unless otherwise stated.)

- Amount of indemnity required
- * is for any one claim ~~relates to claims~~ or series of claims arising out of one event
- * is the aggregate amount for any one period of insurance

(If no amount is stated, insurance under clause 6.15 shall not be required.)

and is

£ _____

Sub-limits within the overall level of cover

Specific exclusions listed in the relevant schedule(s) (or other policy document(s)) to the relevant policy

Cover for pollution and contamination claims

(If no amount is stated, such cover shall not be required; unless otherwise stated, the required limit of indemnity is an annual aggregate amount.)

☐ is required, with a sub-limit of indemnity of

£ _____

☐ is not required

Expiry of required period of Professional Indemnity insurance is

(If no period is selected, the expiry date shall be 6 years from the date of practical completion of the Works.)

- * 6 years
- * 12 years
- * _____

(not exceeding 12 years) _____ years

Professional Indemnity Insurance today

- Current market?
- Cladding / fire related?
- Types of insurance:
 - Each and every claim
 - Any one claim
 - Any one claim and in all
 - Aggregate
 - Aggregate subject to automatic reinstatement
- What level / type is appropriate



Joint Fire Code



Joint Fire Code: the Joint Code of Practice on the Protection from Fire of Construction Sites and Buildings Undergoing Renovation, published by Construction Industry Publications Ltd and the Fire Protection Association, current at the Base Date.

6.17

The Joint Fire Code

* applies/does not apply^[24]

If the Joint Fire Code applies, state whether the insurer under Insurance Option A, B or C (paragraph C.2) has specified that the Works are a 'Large Project':

* Yes/No^[24]

6.20

Joint Fire Code – amendments/revisions

(The cost shall be borne by the Contractor unless otherwise stated.)

The cost, if any, of compliance with amendment(s) or revision(s) to the Joint Fire Code shall be borne by

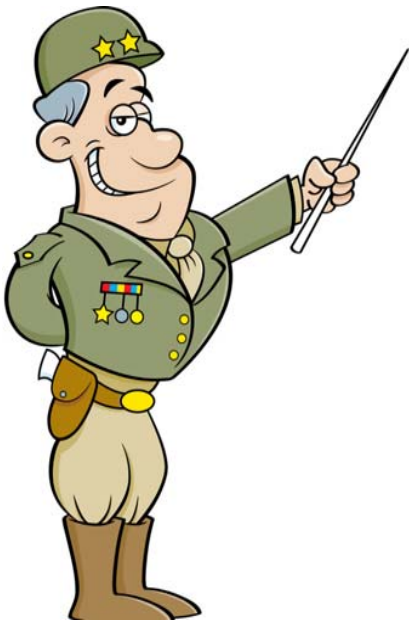
* the Employer/the Contractor

All Risks Insurance

All Risks Insurance^[52]: insurance which provides cover against any physical loss or damage to work executed and Site Materials and against the reasonable cost of the removal and disposal of debris and of any shoring and propping of the Works which results from such physical loss or damage but excluding the cost necessary to repair, replace or rectify:

- CAR – Contractor's All Risks insurance
- Specialist policy
- Joint names
- Composite insured
- No rights of subrogation
- "All" risks (minus exclusions)

All Risks Insurance – Terms & Principles



- Joint Names Policy – a policy in the name of two parties with one loss payee
- Loss Payee – the party who will be paid from the insurance policy
- Jointly insured vs Composite Insured – Jointly insured – policy can be vitiated by one party. Composite Insured – it cannot
- Vitiating – insurance word for breach – policy can be vitiated / voided
- Subrogation – when the insurer steps in to recover sums it has paid out under a policy from a defaulting party.
- Noted on the Policy – if you are noted on the policy, you are not insured on the policy. Very limited rights.

All Risks Insurance – JCT Requirements

- Joint names – [two] insured parties – Employer and Contractor and others?
- Composite insured
- No rights of subrogation
- No rights of vitiation
- Applies to **all** sub-contractors
- Does **not** apply to professionals
- Loss payee is the Employer

All Risks Insurance – Contract Particulars

6.7 and Schedule 3

Works insurance – Insurance Option applicable

Schedule 3:

- * Insurance Option A applies
- * Insurance Option B applies
- * Insurance Option C applies

Percentage to cover professional fees

(If no other percentage is stated, it shall be 15 per cent.)

_____ per cent

Where Insurance Option A applies and cover is to be provided under the Contractor's annual policy (paragraph A.2), the annual renewal date is
(as supplied by the Contractor)

Where Insurance Option C applies, paragraph C.1¹²¹¹

(Unless otherwise stated, paragraph C.1 applies. If it is not to apply, state the reference number and date or other identifier of the replacement document(s).)

- * applies
- * is replaced by the provisions of the following document(s)

(the 'C.1 Replacement Schedule')

All Risks Insurance – Three Options

- As easy as ...
 - Option A – New build – Contractor takes out the All Risks policy
 - Option B – New build – Employer takes out the All Risks policy
 - Option C – Existing structures / works in or extensions to them – Employer takes out the All Risks policy and the Existing Buildings Policy (at least theoretically!)

All Risks Insurance – Option A

- Used on most new build projects
- Contractor is required to take out the All Risks policy
- The policy is in the joint names of Employer and Contractor
- Covers all sub-contractors
- Loss payee is the Employer
- It is a joint names, composite insured policy with no rights of subrogation

All Risks Insurance – Option B

- Used on most new build projects where the Employer maintains insurance
- Similar to Option A, Option B requires both the Employer and Contractor to be insured
- Again, the loss payee is the Employer who then pays for the cost of the reinstatement works.
- This option tends to be unusual – which Employers can get Option B?



All Risks Insurance – Option C

- Key is to understand two things being insured:

Existing Structures

- Employer required to take out a Joint Names Policy for Specified Perils for **Existing Structures**
- Can they obtain this in the market?
- Extension to existing Buildings Policy?
- Contract needs to be extended to reflect actual position.
- Employer very unlikely to be able to get Joint Names?
- C1 Replacement Schedule - See footnote!

Works

- Employer required to take out a Joint Names Policy for All Risks for the **Works**
- Can they obtain this in the market?
- Why do they need to – use Contractor's Policy?
- Contract needs to be amended to reflect actual position.
- C2 realistic?

All Risks Insurance – Options C1 and C2

Existing Structures and contents – Joint Names Policy for Specified Perils

- C.1** The Employer shall unless otherwise stated by the Contract Particulars for clause 6.7 and this Schedule effect and for the period specified in clause 6.7.2 maintain a Joint Names Policy in respect of the Existing Structures together with the contents of them owned by it or for which it is responsible, for the full cost of reinstatement, repair or replacement of loss or damage due to any of the Specified Perils.

The Works – Joint Names Policy for All Risks

- C.2** The Employer shall effect and for the period specified in clause 6.7.2 maintain a Joint Names Policy for All Risks Insurance with cover no less than that specified in clause 6.8 for the full reinstatement value of the Works or (where applicable) Sections (plus the percentage, if any, stated in the Contract Particulars to cover professional fees).

All Risks Insurance – Option C

- You cannot simply say Option C applies!
- You will be negligent!
- Fire occurs?
- Follow it through – you are sued!



All Risks Insurance – Option C – JCT Footnote

- [51] **Insurance Options A and B** are for use in the case of new buildings. **Insurance Option A** is applicable where the Contractor is required to take out a Joint Names Policy for All Risks Insurance of the Works or to include them on that basis within its Annual Construction policy; **Insurance Option B** is applicable where the Employer has elected to take out that Joint Names Policy. **Insurance Option C** is for use in the case of alterations of or extensions to Existing Structures. Under that option, the Employer is required to take out a Joint Names Policy for All Risks Insurance for the Works and also, if paragraph C.1 applies, a Joint Names Policy to insure the Existing Structures and their contents owned by it or for which it is responsible against loss or damage by the Specified Perils. Some Employers (e.g. tenants and some homeowners) may not be able readily to obtain the Joint Names cover required under paragraph C.1. Where that is the case, alternative arrangements through use of a C.1 Replacement Schedule or as otherwise described in the Design and Build Contract Guide will be necessary. **Where there are Existing Structures, it is vital that any prospective Employer which is not familiar with Insurance Option C – in particular any Employer which is a tenant or domestic homeowner – or an appropriate member of the Employer's professional team, should consult specialist insurance advisers prior to the tender stage. Any Employer which is a tenant should also consult its insuring landlord prior to that stage.**

Employer's Controlled Insurance Policies

- ECIPs
- Contractor insolvency?
- Protects stakeholders
- Expensive?

Questions



Thank you

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