

Terrorism Cover Update

Issued December 2009

JCT's Works insurance provisions have been updated in relation to Terrorism Cover and the Contractor's liability for loss or damage to the Works or Site Materials resulting from terrorism in cases where Insurance Option A applies.

The amendments set out below have been agreed in relation to the Works insurance provisions of the Standard Building Contract in both its With Quantities (Q) and Without Quantities (XQ) versions. Amendments in substantially the same terms are required for the Approximate Quantities (AQ) version of that contract and for the Design and Build Contract, Management Building Contract, Prime Cost Building Contract and Intermediate Building Contract. In the case of the Measured Term Contract, similar amendments may also be appropriate.

Clause number and heading	Action
Contract Particulars, 6-10 and Schedule 3	Insert new entry:
'6-10 and Schedule 3	Terrorism Cover – details of the required cover <i>(State reference numbers and dates or other identifiers of documents setting out the requirements. Unless otherwise stated, Pool Re Cover is required.)</i>
Contract Particulars, 6-11	Delete '6-11' and insert '6-12' (twice)
Contract Particulars, 6-13	Delete '6-13' and insert '6-14'
Contract Particulars, 6-16	Delete '6-16' and insert '6-17'
Contract Particulars, Part 2 (E) (ii)	Delete '6-11' and insert '6-12'
Clause 1-1	Funder Rights Particulars: delete '6-11' and insert '6-12' P&T Rights Particulars: delete '6-11' and insert '6-12'
Clause 4-3-1-3	Delete 'paragraph A-5-1 of Schedule 3' and insert 'clause 6-10-2'
Clause 4-3-3-5	After 'clause 2-6-2' insert 'or 6-10-3'
Clause 4-16-2-1	After '3-17' delete 'or' and insert comma; After '6-5' insert ', 6-10-2 or 6-10-3'; After 'paragraph' delete 'A-5-1,'
Clause 4-16-2-3	Delete '6-10-4-2' and insert '6-11-5-2'
Clause 4-16-3-2	After 'to the Employer' insert 'under clause 6-10-2 or'
Clause 6-8, Excepted Risks	Amend the existing definition by insertion of the words underlined: 'Excepted Risks: <u>the risks comprise:</u> (a) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof <u>(other than such risk insofar, but only insofar, as it is included in the Terrorism Cover from time to time required to be taken out and maintained under this Contract);</u> (b) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds; <u>and</u> (c) <u>any act of terrorism that is not within the Terrorism Cover from time to time required to be taken out and maintained under this Contract.'</u>

Clause number and heading	Action
Clause 6-8, Pool Re Cover	<p>Insert as an additional defined term:</p> <p>'Pool Re Cover: such insurance against loss or damage to work executed and Site Materials caused by or resulting from terrorism as is from time to time generally available from insurers who are members of the Pool Reinsurance Company Limited scheme or of any similar successor scheme.'</p>
Clause 6-8, Terrorism Cover	<p>Amend the existing definition by deletion of the words crossed through and insertion of the words underlined:</p> <p>'Terrorism Cover: Pool Re Cover or other insurance against provided by a Joint Names Policy under Insurance Option A, B, C for physical loss or damage to work executed and Site Materials <u>(and/or, for the purposes of clause 6-11-1, to an existing structure and/or its contents)</u> caused by <u>or resulting from</u> terrorism.'</p>
New Clause 6-10	<p>Insert as clause 6-10 the following new clause:</p> <p>'Terrorism Cover – policy extensions and premiums</p> <p>6-10 ·1 To the extent that the Joint Names Policy for the Works and Site Materials excludes (or would otherwise exclude) loss or damage caused by terrorism, the Contractor, where Insurance Option A applies, or the Employer, where Insurance Option B or C applies, shall unless otherwise agreed take out and maintain, either as an extension to the Joint Names Policy or as a separate Joint Names Policy, in the same amount and for the required period of the Joint Names Policy, such Terrorism Cover as is specified in or by the Contract Particulars, subject to clauses 6-10-4 and 6-11.</p> <p>·2 Where Insurance Option A applies and the Contractor is required to take out and maintain Pool Re Cover, the cost of that cover and its renewal shall be deemed to be included in the Contract Sum save that, if at any renewal of the cover there is a variation in the rate on which the premium is based, the Contract Sum shall be adjusted by the net amount of the difference between the premium paid by the Contractor and the premium that would have been paid but for the change in rate.</p> <p>·3 Where Insurance Option A applies and Terrorism Cover other than Pool Re Cover is specified as required, the cost of such other cover and of its renewal shall be added to the Contract Sum.</p> <p>·4 Where Insurance Option A applies and the Employer is a Local Authority, if at any renewal of the Terrorism Cover (of any type) there is an increase in the rate on which the premium is based, he may instruct the Contractor not to renew the Terrorism Cover. If he so instructs, the provisions of clauses 6-11-5-1 and 6-11-5-2 shall apply with effect from the renewal date.'</p>
Clause 6-10	<p>Renumber existing clause 6-10 as clause 6-11 and amend the re-numbered clause by deletion of the words crossed through and insertion of the words underlined:</p> <p>'Terrorism Cover – non-availability – Employer's options</p> <p>6-11-10 ·1 If the insurers named in the any Joint Names Policy, or (where Insurance Option C applies) the insurers named in either or both such policies, notify either Party that, with effect from a specified date (the 'cessation date'), Terrorism Cover will cease and will no longer be available <u>or will only continue to be available with a reduction in the scope or level of such cover,</u> the recipient shall immediately notify the other Party.</p> <p>·2 The Employer, after receipt of such notification but before the cessation date, shall give notice to the Contractor either:</p> <p>·1 that, notwithstanding the cessation <u>or reduction in scope or level</u> of Terrorism Cover, the Employer requires that the Works continue to be carried out; or</p> <p>·2 that on the date stated in the Employer's notice (which shall be a date after the date of the insurers' notification but no later than the cessation date) the Contractor's employment under this Contract shall terminate.</p>

Clause number and heading

Action

- ~~3~~ 3 Where Insurance Option A applies and the Employer gives notice under clause 6-11-2-1 requiring continuation of the Works, he may instruct the Contractor to effect and maintain any alternative or additional form of Terrorism Cover then reasonably obtainable by the Contractor; the net additional cost to the Contractor of any such cover and its renewal shall be added to the Contract Sum.
- ~~43~~ 43 If the Employer gives notice of termination under clause 6-11-2-2, then upon and from such termination the provisions of clauses 8-12-2 to 8-12-5 (excluding clause 8-12-3-5) shall apply and, notwithstanding any the other provisions of this Contract, no further sum shall become due to the Contractor other than the amounts referred to in clauses 8-12-3-1 to 8-12-3-4 which require any further payment or any release of Retention to the Contractor shall cease to apply.
- ~~54~~ 54 If the Employer does not give notice of termination under clause 6-11-2-2, then:
- ~~1~~ 1 if work executed and/or Site Materials suffer physical loss or damage caused by terrorism, the Contractor shall with due diligence restore the damaged work, replace or repair any lost or damaged Site Materials, remove and dispose of any debris and proceed with the carrying out of the Works;
 - ~~2~~ 2 the restoration, replacement or repair of such loss or damage and (when required) the removal and disposal of debris shall be treated as a Variation, without deduction of Retention and with no reduction in any amount payable to the Contractor pursuant to this clause 6-11-5-6-10-4 by reason of any act or neglect of the Contractor or of any sub-contractor which may have contributed to the physical loss or damage; and
 - ~~3~~ 3 (where Insurance Option C applies) the requirement that the Works continue to be carried out shall not be affected by any loss or damage to the existing structures and/or their contents caused by terrorism but not so as thereby to impose any obligation on the Employer to reinstate the existing structures or affect the rights of either Party under paragraph C-4-4 of Schedule 3.

Clause 6-11	Renumber existing clause 6-11 as clause 6-12
Clause 6-12	Renumber existing clause 6-12 as clause 6-13; Delete '6-11' and insert '6-12'
Clause 6-13	Renumber existing clause 6-13 as clause 6-14; Delete '6-14 to 6-16' and insert '6-15 to 6-17'
Clause 6-14	Renumber existing clause 6-14 as clause 6-15
Clause 6-15	Renumber existing clause 6-15 as clause 6-16; Delete '6-15-1-2' and insert '6-16-1-2' (four instances)
Clause 6-16	Renumber existing clause 6-16 as clause 6-17
Clause 8-12	Delete '6-10-2-2' and insert '6-11-2-2'
Schedule 3, paragraph A-4-2	Delete '6-10-4-2' and insert '6-11-5-2'
Schedule 3, paragraph A-4-6	After 'Joint Names Policy' insert 'or payable to him under clause 6-11-5-2, where applicable'
Schedule 3, paragraph A-5	Delete the whole of paragraph A-5 and its heading
Schedule 3, paragraph B-3-2	Delete '6-10-4-2' and insert '6-11-5-2'
Schedule 3, paragraph C-4-2	Delete '6-10-4-2' and insert '6-11-5-2'
Schedule 5, Part 1, paragraph 5	Delete '6-11' and insert '6-12'
Schedule 5, Part 2, paragraph 9	Delete '6-11' and insert '6-12'

Guidance Notes to the Terrorism Cover Update

JCT has previously highlighted through contract footnotes and guides certain possible issues regarding the extent of Terrorism Cover and compliance with the requirements of Insurance Options A, B and C.

This Update is intended to rationalise the position, in particular with respect to the Contractor's liability for loss or damage to the Works and Site Materials in cases where Insurance Option A applies.

In the absence of any relevant limitation or exclusion, the Contractor's underlying obligation to restore, replace or repair any fire or other damage to the Works under that Insurance Option in effect meant that he bore the risk of any such loss or damage to the extent that it fell outside Pool Re or other terrorism cover that he 'bought back', whether by way of an extension to his CAR or specific Works Insurance policy or through a separate policy.

Originally the risk was substantially covered by the buy-back of cover under the Pool Re scheme established by the Reinsurance (Acts of Terrorism) Act 1993 ('the 1993 Act'), since insurers' original exclusions of terrorism risk and Pool Re cover were both based on that Act's definition of terrorism. The gap between exclusion and cover arose after the passing of the Terrorism Act 2000 ('the 2000 Act'). In the 2000 Act, terrorism was defined as including not only acts connected to organisations with activities directed towards overthrowing or influencing any government by force or violence (the 1993 Act definition) but also acts of individuals (alone or on behalf of any organisation) committed for political, religious, ideological or similar purposes, not only where directed towards the overthrow or influencing of governments but also any intended to put any section of the public in fear. Adoption of the wider definition by insurers enlarged their standard terrorism exclusion beyond the 1993 Act risks covered by Pool Re but Pool Re cover was not extended in this respect. The gap was illustrated by the 'Unibomber' Soho bombing and Huntingdon Life Sciences cases.

Not all insurers adopted the wider exclusion and an alternative to Pool Re, Lloyds market cover, has been available to cover the wider 2000 Act risks. Unlike Pool Re cover, however, that alternative cover does not extend to chemical or biological damage in commercial cases and also normally requires an extension for nuclear risks. The JCT has therefore agreed that both the Contractor's liability (where Insurance Option A applies) and, for each Insurance Option, the contractual obligation of the relevant Party to obtain Terrorism Cover should be limited to the risks insured by Pool Re or by such other insurance cover as is specified in the Contract Particulars for clause 6.10. Pool Re cover is the default position.

A new clause 6.10 sets out the underlying obligation to effect Terrorism Cover. This is coupled with an extension to the clause 6.8 definition of Excepted Risks, which operates through the clause 6.6 exclusion of Contractor's liability for those risks and also limits the required ambit of All Risks Insurance, as defined in clause 6.8.

Where the Contractor is to obtain the Works Insurance and Pool Re Cover is required, the anticipated cost is intended to be included in the Contract Sum as tendered (clause 6.10.2), subject to adjustment for changes in renewal costs. Where Terrorism Cover other than Pool Re is required, the costs of effecting and renewing cover are treated as an addition to the Contract Sum, since at present the cost may not be as predictable as that of Pool Re (see clause 6.10.3). Clauses 6.10.2 and 6.10.4 incorporate the provisions formerly in paragraph A.5 in Schedule 3.

Clause 6.11 (the former clause 6.10) retains the provisions regarding non-availability at the renewal date and the Employer's consequent option to terminate. However, it also now extends the provision to cover any reduction in the scope or level of cover by insurers and contains an option for the Employer, where the Contractor is responsible for Works Insurance, to require him to switch to any alternative form of Terrorism Cover reasonably available at the renewal date.

It will be noted that in the case of residential property, i.e. houses and blocks of flats and other dwellings insured in the name of a private individual, Pool Re continues to exclude nuclear, chemical and biological risks.

In all cases Pool Re Cover requires annual renewal: Lloyds market cover may be available for the duration of the project.

Effecting Terrorism Cover may still be difficult in certain situations. **The JCT would again stress that relevant details of this, and of Works insurance generally, require discussion and agreement between the Parties and their insurance advisers prior to entering into the Contract.**

Use of Terrorism Cover Update

Either amend the contract in accordance with this Update and execute it as so amended. Each amendment should be initialled by or on behalf of the parties.

or attach this Update to the Agreement; and insert in the Articles an additional Article which states:

"Article *.....: Terrorism Cover Update – incorporation

The Conditions shall have effect as modified by the amendments in the attached Terrorism Cover Update."

* Allocate the next available Article number.