



CONTRACT MANAGEMENT AND DISPUTES

Building Control: High Rise, High Risk?

Dame Hackitt's 2018 report 'Building a Safer Future' was published following the tragic fire on 14 June 2017 at Grenfell Tower. The recommendations focused on changes to the safety regulations in construction of High Rise Residential Buildings (HRRBs), but could they have a wider impact on contract management and disputes?

The extent to which the recommendations will be implemented still remains unclear, although some have been incorporated into the UK Government's revised Approved Document B on Fire Safety, for which the public consultation finished in October 2018. In this article, Richard Begbey shares some insight into the potential impact at each stage of the construction process should the recommendations be adopted in full.

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Application: building a benchmark

The key focus of Dame's Hackitt's report is on HRRB and calls for a new regulatory body, a 'Joint Competent Authority' (JCA), comprising of Local Authorities Building Standards, fire and rescue services and the Health and Safety Executive. This new body would have far-reaching and significant powers and could significantly change the regulatory process applicable to the construction industry. The recommendations suggest that this may take form as an industry-wide body which should be introduced to other high-risk residential buildings, as well as institutional residential buildings. This could result in high-rise commercial buildings, schools, hospitals, hotels and the like also being subject to the same



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regulations. Indeed, in response to the Hackitt report the Construction Industry Council has stated:

*"7.2 CIC Council's conclusion was that work should now be done on the key aspects of systemic change which would be applied to all buildings and then to look at what additional regulatory oversight should apply to higher risk buildings."*¹

It should therefore be considered that these recommendations could be a statutory benchmark for the industry.

Design: reducing clashes

Chapter 2 of the report focuses on 'Design, Construction and Refurbishment' and calls for a more detailed planning/approval process with *"a more rigorous and investigatory skill set than is currently required from those responsible for building control."*² The aim here is to *"drive a culture change where duty holders apply more rigour and upfront investment in detailed plans before building work actually commences."*³ Only once the plans are fully considered to this new level will authority to begin construction be given.⁴ This could significantly change the ability for an accelerated start on-site without line permission for ground works. As such, the recommendation could feasibly require the employer and designer to submit the details of the entire construction project down to the smallest detail.

The construction management or design and build procurement routes were traditionally seen as a quicker way to get construction started as it allows contractors to commence on-site with a less developed design and progress works with the full design of the remaining works completed later, enabling an accelerated start. This may no longer be the case. The design and build route can still operate as it is the transfer of design risk based on Employer's Requirement's, but it potentially diminishes the ability for an early start. If the employer is required to provide a fully detailed design of the whole building to obtain JCA approval to commence, then it may give rise to a more traditional procurement route with the pricing with a bill of quantities (BoQ's) as the specific details will be known.

So often, disputes arise because of design clashes that are only identified during construction and the inevitable fight over the design responsibility after the time and cost of additional and/or remedial works has occurred. This recommendation could significantly reduce the occurrence of such clashes as the design has to be fully developed before breaking ground.

Procurement and supply: protecting safety

Recommendation 9.1 (a) states that *"contractors and clients should devise contracts that specifically state that safety requirements must not be compromised for cost reduction."* It is not clear if this is recommending an express clause in contracts or for the JCT and NEC for example, to release specific standard forms of contract for HRRBs. What effect this could have is not yet understood as it would depend on the applicable test for the clause; would this simply be compliance with the relevant Part B approved document or not? If so, this is a statutory requirement and further amendment may not be necessary.

The role of the tender review team could require more onus in the safety process here and may become more important at testing whether safety has been compromised by costs.⁵

Construction: reducing variations

During construction, the major recommendation of note is the introduction of a statutory change control process. Any *"changes which could impact on previously signed off building safety plans"*⁶ would need to be submitted to the JCA and considered before any work is commenced. This could mean that even a small variation, such as moving a doorway, could change a safety plan and will require resubmission and review. Similar provisions for changes to approved plans exist already but in some instances retrospective permission is applied for. This would suggest that this is prohibited, and any changes must be pre-approved. On this basis, all connected works would need to be suspended until such time as the change is approved. With the far-reaching powers of the proposed JCA a contractor may be prevented from proceeding at risk and seek retrospective permission.

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¹ Graham Watts OBE, Chief Executive, CIC Response to Building a Safer Future/Final/31.07.18

² Para 2.30 'Building a Safer Future – Independent Review of Building Regulations and Fire Safety: Final Report'

³ Para 2.29 'Building a Safer Future'

⁴ Para 2.31 'Building a Safer Future'

⁵ Recommendation 9.2 'Building a Safer Future'

⁶ Recommendation 2.9 'Building a Safer Future'

which 'could' impact a safety plan, an employer and designer may have to consider the decision to issue a variation more carefully. With the recommendation to fully develop detailed plans prior to construction, there could be significant potential here to reduce variations during construction and therefore reduce the occurrence of claims.

Completion: boosting standards

At completion, there would be new and more stringent checks prior to occupancy being approved. It is unclear how stringent any such 'Completion Certificate' from the JCA would be, but it may have implications on what is defined as 'Practical Completion' (PC) and items currently allowed to be completed as post-PC snags could be rejected by the JCA. This would mean that the definition of PC under the applicable contract also becomes more prescriptive. This may change how a contractor estimates their cash flow and organises their operations, for example, amending the date of demobilising the main project to only snagging staff, or affecting the date of insurances, bonds, and release of retention. If PC was linked to the JCA Completion Certificate, it would likely encourage the contractor to achieve greater standards during construction instead of extensive post-PC snagging works. Greater detail of inspections throughout the course of the work would be expected to result in a reduction of defects.

Retention is typically released a year or so after the completion of the works and at the end of the defects notification period.⁷ However, Recommendation 2.13 states *"time limits for bringing prosecutions against duty holders should be increased to five or six years for 'major' deficiencies in building requirements identified at a later date"*. Could this therefore potentially require a change to typical contract provisions in order to incorporate longer defects notification periods and possible indemnity clauses for employers?

Golden thread of building information: a statutory requirement?

The uptake of Building Information Modeling (BIM) has been slower than hoped.⁸ However, Dame Hackitt recommends that a golden thread of digital information becomes a statutory requirement for each stage of the building process: design; completion; and maintenance.⁹ This could mean mass uptake of BIM as a standard form of requirement.

Supporters of BIM have many pro-arguments for its adoption. For dispute avoidance in particular, it may reduce the risk of design conflicts as it models the information at the outset and any updates to the model should identify risks prior to their occurrence on-site. The model can also manage time, costs and provide information for better decision-making, potentially reducing the occurrence of conflicts and therefore disputes.

Although disputes will continue to arise, digitalising the construction process into a 'golden thread' has significant potential for creating and storing comprehensive and structured records of design, reports, programmes, progress, decisions, changes and costs as they will become more readily available for dispute professionals, as well as stakeholders requiring information to make analyses and decisions. This could have significant advantages to the parties involved. Too often, we ask for records and details that have been lost or destroyed, or saved on a laptop then wiped when an employee leaves or changes projects. With more detailed, higher quality information, a dispute professional can analyse the information more accurately and can provide increasingly robust advice for settlement with fewer caveats. The more robust the advice, the more likely it is that settlement can be promoted between the parties, thus mitigating the likelihood of escalation to expensive arbitration or litigation proceedings.

Whilst we wait to see which recommendations are implemented, it is clear that they could have a significant impact on the industry as a whole at each stage of the construction process - not just on improving safety.

If you experience issues in your construction projects, FTI Consulting's experts are experienced in resolving disputes across all areas of the sector and can support you at every stage of a project. For more information please contact richard.begbey@fticonsulting.com

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⁷ Or other terminology depending on the contract form.

⁸ *'How has the construction industry adapted to the new BIM Protocol?'* David Greenwood, Pinsent Masons, Outlaw.com, 8 November 2018

⁹ Recommendations 2.7, 7.5 and 8.1-8.4 *'Building a Safer Future'*

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