When it comes to commercial property developments, the most popular industry form of building contract used in the UK is the JCT Design and Build Contract. It is widely used within the construction industry for projects of in excess of approximately £1 million.

**JCT**
The Joint Contracts Tribunal ("JCT") has, for many years, published standard form agreements for building projects in England and Wales. The Scottish Building Contract Committee ("SBCC") produces versions of the JCT forms for use in Scotland. The Royal Society of Ulster Architects produces adaptation schedules to enable the JCT contracts to be used in Northern Ireland.

**DESIGN AND BUILD**
The essence of a design and build contract ("D&B") is the fact that the Contractor takes responsibility for both the design of a building as well as the workmanship - so that, in theory at least, there is no argument as to whether a defect arises from design or workmanship.

For this reason, either the Contractor contractually appoints the design consultants directly or (the usual case) the designers' contracts of appointment with their client are 'novated' to the Contractor at the same time as the Contractor is engaged by the client ("Employer") under D&B. For more information on novation, see our separate briefing note on the subject.

**SINGLE POINT RESPONSIBILITY**
The advantage of D&B is that, if a defect arises due to either the design or construction of the works, damage is caused and the Employer suffers loss, the Employer's primary route of recourse will be against the Contractor; the Employer does not need, at least in the first instance, to pursue its design consultants and/or the sub-contractors for the loss.

For this reason, D&B comes with a price tag. The construction contract price (to be paid by the Employer) includes a premium - which reflects the Contractor's acceptance of a greater degree of responsibility than under a traditional procurement route.

**'DB 11'**
The JCT Design and Build Contract 2011, which is also known by the abbreviation ("DB 11"), is published by the JCT.

The JCT revamped its entire suite of contracts in 2005. In 2011, it launched a new edition with amended clauses that reflect the provisions made (in the autumn of 2011) to the Housing Grants, Construction and Regeneration Act 1996 ("Construction Act") by of the Local Democracy, Economic Development and Construction Act 2009 (which related to payment and adjudication). For more information on the Construction Act and the 2011 changes to it, see our separate briefing notes on these subjects.
DB 11 consists of three parts:

**Employer’s Requirements** - These are prepared by the Employer and set out what it is that the Contractor is to build;

**Contractor’s Proposals** - These form the Contractor’s response to the Employer’s Requirements and set out how the Contractor proposes to achieve the build set out in the Employer’s Requirements; and

the JCT contract itself (in the form of a booklet) - This is frequently amended using a schedule of amendments (see Our Approach, at the end).

### ROLES UNDER DB 11

**Employer**
The Employer is the entity who wishes to procure the development.

**Contractor**
This is the main building contractor, the other party under the building contract. The Contractor is required to procure the works under the building contract and does so by using sub-contractors to whom packages of works (for example, cladding and piling) are let.

**Employer’s Agent**
This function is performed by a consultant appointed by the Employer to carry out monitoring and certification. DB 11 contains detailed mechanisms for the certification of additional time, money and the completion of the works. The Employer’s Agent is usually an independent third party appointed by the Employer (but may be in house).

**CDM Co-ordinator**
This role is performed by a consultant appointed by the Employer and relates to health and safety aspects of the project. The main duties are to advise the Employer on and assist it with its client duties under the Construction (Design and Management) Regulations 2007 ("CDM"); provide notification to the Health and Safety Executive; co-ordinate the health and safety aspects of design work; identify, collect and pass on construction information; and prepare and update the so-called health and safety file that is required at the by the end of the works and which relates to health and safety aspects of the completed project. There are criminal penalties for failure to comply with CDM - which is one of the most important pieces of health and safety legislation concerning construction activities; for more information, see our separate briefing note on the subject.

### THE STANDARD FORM

The clauses of DB 11 (and the provisions and mechanisms contained within them) are designed and intended to regulate the carrying out of the project. We set out below a summary of each of the main sections of the contract:

**Section 1 - Definitions and interpretation**
This deals with defined terms used in DB 11, the effect of the final statement which is issued with regard to the final amount payable by the Employer under the Contract and which law is to be applied to the contract.

**Section 2 - Carrying out the works**
This sets out the Contractor’s main obligations. The section makes provision for:

- general obligations that are applicable to the carrying out of the work, including that they should be carried out in a proper and workmanlike manner;
- issues to do with materials, goods and workmanship;
- possession of the site; and
- work carried out by others.

Importantly, this clause also deals with the situation where there are differences between the Employer's Requirements and the Contractor's Proposals. As drafted, DB 11 provides that the Employer has to pay for any differences. We would usually seek to rectify this.

This section also deals with the adjustment of the completion date. The mechanism allows the completion date to be moved to give the Contractor additional time to complete in the event that any of the events outlined in the clause occur. Should the completion date not be achieved (once moved if appropriate), the Contractor is liable to pay liquidated and ascertained damages (often abbreviated to LADs or LDs), usually set out in a weekly sum. These are set out in the building contract, once they have been agreed between the Employer and the Contractor, and represent the Employer’s sole remedy in relation to delay.

The certification process is also outlined in this section - a two stage process which is common in the UK construction industry. First, the works are certified as practically complete (which means that the works are completed, with the exception of minor snagging items, and can be occupied). Then, after a period to be specified in the building contract (known as the rectification period, and usually 12 months long), the Employer's Agent re-inspects the works to check if everything on the snagging list has been rectified and any other defects that have appeared during that 12 month period have been made good. If this is the case, then the Employer's Agent issues the Notice of Completion of Making Good.

The section also includes a copyright licence in relation to the design documents produced by the Contractor.

**Section 3 - Control of the works**
This contains provisions concerning access, sub-contracting, the Employer's instructions and the operation of the CDM Regulations and SWMP Regulations to the project.

**Section 4 - Payment**
Section 4 of deals with payment. The provisions relate to the frequency of the payments and the process itself - both of which are, to some extent, governed legislation.

Construction contracts are governed by the Construction Act (for more information, see our separate briefing notes on these subject). The Act contains strict rules in relation to payment, including a right for the Contractor to receive staged payments, an obligation to show due and final dates for payment and a mechanism to govern withholding of any payment. It is vitally important that these rules are followed in the administration of the Contract as failure to do so could result in the Employer having to pay money that he does not believe to be due.
Payment under DB 11 is made in stages with the Contractor making an application for payment for what it claims it is entitled to in any payment period (often a month). The Employer’s Agent then checks this application, informing the Contractor what sum will be paid against the application and whether or not any money will be withheld - for example, for work not properly completed.

Within three months of practical completion of the works the Contractor submits a final statement to the Employer stating how much he has been paid and how much he believes is still owed. This will set out charges for the original works and any Changes that have been made during the course of the works. The Employer's Agent then checks the final statement and then gives notice to the Contractor stating the amount of the payment proposed to be made, to what the amount relates and the basis on which the amount has been calculated also giving details of any amount to be withheld or deducted.

The timescales for carrying out these valuations and making payment are set out in the Contract and should be carefully adhered to.

This section also deals with valuation of any additional sums that may be due under the Contract. The calculation of relevant matters affecting loss and expense, which could entitle the Contractor to additional sums (Relevant Matters), is set out at clause 4.21 of the Contract.

In addition, the Contract provides for a retention to be used. This is often either three or five per cent of the contract sum. This amount is retained from every interim payment made to the Contractor. Upon practical completion of the works, half of this retention is released to the Contractor. Upon certification of the issue of certificate of making good defects, the balance of the retention is released to the Contractor.

Section 5 - Changes
Section 5 deals with changes. Whilst a "Change" is defined under the contract, the concept broadly encompasses the situation where the Contractor has been asked to do something which is not covered by the Contract. Where this means that more work is required, the Contractor will be entitled to additional money. Where it means that less work will be required, the Contractor will be entitled to less money.

Section 6 - Injury, damage and insurance
This section relates to the insurances which are to be taken out with regard to the works, including personal injury and property damage.

There are three options for insurance of the works. These are that the Contractor takes out all risk insurance (new build) (option A), the Employer takes out all risk insurance (new build) (option B) or the Employer takes out insurance (works are to be carried out in an existing structure) (option C). It is most frequent where works are new buildings for the Contractor to take out the all risk insurance under which the Employer is joint insured.

Section 7 - Assignment, third party rights and collateral warranties
This deals with assignment of the building contract and collateral warranties.

The default position under DB 11 is that neither party can assign the contract without consent of the other. We would look to rectify this within the schedule of amendments (see below).

The rest of this section deals with rights for third parties. This requires the creation of a contractual link with purchasers, funders and tenants where one does not normally exist. This link is either by way of a collateral warranty, which is a separate document entered into by the Contractor, his sub-contractor or consultant as appropriate, or in terms of third party rights. We would usually recommend the use of warranties.

Section 8 - Termination
This section deals with the circumstances that allow each party to terminate the contract.

Section 9 - Disputes
This deals with disputes. The contract gives the parties a choice between arbitration and court proceedings. We advise choosing court proceedings.

In addition, a procedure called adjudication applies to construction contracts. This is a 28 day dispute resolution procedure where disputes are referred in writing to an adjudicator. All construction contracts must allow each party to the contract to refer a dispute to adjudication should they choose. Where a party wishes to refer a dispute to adjudication, they serve a notice of intention to refer on the other side. It is exceptionally important that this is dealt with very quickly as the timetable starts as soon as it is served. For more information on the Construction Act and adjudication, see our separate briefing notes on these subjects.

OUR APPROACH
Like other JCT standard form building contracts, DB 11 is commonly amended by bespoke schedules of amendments that are negotiated and agreed between the Employer (often with its funders requiring changes to be made to the standard form to ensure the contract is acceptable to lending banks) and the Contractor.

The intention behind the use of schedules of amendments is to modify the provisions of DB 11 so that (most commonly) the Employer benefits from an increase in the degree of risk that is passed to the Contractor under the contract - on the basis that risk is best managed by the party in control of it.

We advise our clients on all aspects of drafting, negotiating and implementing schedules of amendments. Acting for an Employer, we would usually seek to amend DB 11 to address the risk balance and to tip it back in favour of the Employer.

TYPICAL ISSUES TO ADDRESS
Typical issues we would look to address are:

- making the Contractor take responsibility for any ground conditions there may be on site (this is important as, if there are any unknown issues - such as sub-surface conditions - clients will not want to pay additional money for having any issues arising from them dealt with);
■ an obligation not to use deleterious materials in the construction of the works;
■ a term stating that, if the Employer’s Requirements are inadequate in any way, the Contractor should have foreseen this and priced for it and so not be entitled to any additional money for anything arising from the inadequacy;
■ an enhanced obligation in relation to the Contractor’s design liability;
■ deletion of some of the ‘Relevant Events’ allowing the Contractor to claim additional time for certain incidents;
■ an enhanced copyright clause relating to design documents produced by or on behalf of the Contractor;
■ a refinement of the provisions relating to retention, allowing the Employer to use the retention monies, rather than holding them in a separate bank account on trust for the Contractor;
■ a refinement of the provisions relating to ‘Relevant Matters’ which give the Contractor an entitlement to extra money by inserting requirements on the Contractor (what the Contractor has to do for that extra money);
■ amending the contract to allow for assignment by the Employer;
■ adding in additional obligations concerning the provision of collateral warranties;
■ adding in the provision of a performance bond and parent company guarantee (if these are required on this project); and
■ adding in forms of warranty, parent guarantee and bond (as appropriate and as required).

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**REALWORLD** is our interactive online guide to real estate that provides answers to the key questions that arise when entering foreign real estate markets.

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For more information or to request additional information on WIN please contact Richard Norman or Bethany Jennings via [www.dlapiperwin.com](http://www.dlapiperwin.com).

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