

Guidance Note — Construction ESG

Statistics show that the construction industry was responsible for 37% of global carbon dioxide emissions in 2020. The need for the sector to address its environmental impact is therefore obvious. Whilst there is still a long way to go, there are clear signs that environmental, social and governance (“ESG”) considerations are taking a more central role in influencing how construction projects are designed and built in the UK. Here we address how ESG considerations are currently being dealt with in construction documents from both a technical and a legal perspective.

MOVING FROM “DESIGN FOR COMPLIANCE” TO “DESIGN FOR PERFORMANCE”

Traditionally, the construction industry has sought to improve the energy efficiency of new or refurbished buildings through a “design for compliance” approach. This methodology has involved designing buildings to achieve certain efficiency standards which are certified at, or shortly before, practical completion. This approach has been criticised for failing to achieve the energy efficiency benefits that were envisaged at the design stage once the building is occupied and in operation.

A “design for performance” approach is increasingly being adopted by developers and involves taking a more outcomes-based analysis and greater focus on how buildings will be used after works have been completed. For example, many office developments are targeting a [NABERS](#) energy rating which adopts this new approach.



It requires developers to engage with the ultimate owner and, if possible, the intended occupier(s) of the building as early as possible in the design process. Developers are also encouraged to appoint a monitoring team to review the contractor’s designs prepared during the construction stage and to monitor the performance of the works with the aim of ensuring that energy efficiency improvements are achieved in practice.

PRACTICAL COMPLETION REQUIREMENTS

A building contract may include pre-conditions that must be achieved before the contract administrator/employer’s agent will certify practical completion of the works. Such pre-conditions may include a requirement for an energy performance certificate to be obtained for a specific rating. Other ESG-relevant ratings, such as those certified by BREEAM, WiredScore

and WELL (please refer to our [ESG Glossary](#) for more detail on these accreditations), may also be included.

CONSTRUCTION MATERIALS

Developers are increasingly considering the environmental impact of using carbon-intensive materials in their construction projects and the issue of embodied carbon in existing buildings. Concrete and steel, two of the most widely used materials in construction projects, each account for eight per cent of global carbon dioxide emissions. As a result, developers are looking to address these concerns by using reclaimed or more sustainable materials, such as timber, to be rated, typically for lighting and power, plus special tenancy requirements or local air conditioning. The Whole Building rating provides an assessment of energy used by office tenancies and by Base Building Services to lettable and common spaces.

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RENEWABLE ENERGY

The construction industry is increasingly adopting renewable energy sources to supply power to new or refurbished buildings. By installing photovoltaic [panels](#), introducing [electric vehicle charging facilities](#) and even battery storage capability on some sites, such steps will be key to improving the environmental credentials of construction projects going forward.

CLAUSES IN STANDARD FORM BUILDING CONTRACTS

Some industry-standard forms of building contract include ESG provisions which the employer may choose to apply. These include:

- **JCT: Supplemental Provision 8** – this optional provision, if selected, encourages the contractor to suggest economically viable amendments to the works which may result in environmental performance improvements. It also requires the contractor to provide all information reasonably requested by the employer regarding the environmental impact of the supply and use of the goods and materials selected by the contractor;
- **NEC4, Clause X29** – this optional provision, if selected, incorporates a set of climate change requirements into the

scope of the works. It also provides for a performance table to benchmark the contractor's performance against certain targets, as well as a mechanism for the contractor to propose climate-related changes to the works; and

- **FIDIC, Clause 4.18** – this clause requires the contractor to take all necessary measures to protect the environment during the course of the works, comply with any environmental impact statement for the works and ensure that emissions and pollutants do not exceed those stated in the Employer's Requirements or as prescribed by law.

One common criticism of these provisions is that they lack any real teeth, either by way of incentive for compliance, or sanction for non-compliance. Their effectiveness is therefore up for debate.

Bespoke clauses

In our experience, some developers require bespoke ESG-related provisions in their building contracts. On the social and corporate governance side of things, bespoke anti-bribery and anti-modern slavery clauses are becoming increasingly common.

Whilst specific climate or sustainability-related clauses are less common, the Chancery Lane Project, a global network of lawyers and business leaders focused on

decarbonisation, has produced numerous precedent clauses which could be adopted. For example, clauses have been drafted which require a contractor to comply with net zero objectives or a carbon budget in the specification of materials. Whilst such clauses would be welcome in focussing minds on environmental issues, it remains to be seen whether these provisions will be taken up with increasing frequency in future and, if so, whether this would make a significant difference in practice, especially without robust enforcement by developers.



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