

The Building Safety Act 2022

Introduction

The Building Safety Act 2022 (“BSA 2022”) was introduced in response to the Grenfell fire that occurred in June 2017 which caused so many tragic deaths and injuries and to the gaps and deficiencies in the legislative environment concerning building and fire safety that were identified in the Hackitt Report (the Independent Review of Building Regulations and Fire Safety) published in May 2018.

It was introduced to provide a regulatory framework designed to encourage the building industry to work collaboratively to remediate the issues particularly with cladding systems, especially on high-rise buildings; to protect the inhabitants of affected buildings from the financial burden of the necessary remedial work; and to create a new and more stringent safety regime to apply throughout the lifecycle of construction projects in order to prevent the reoccurrence of deadly fires.

Since 2022 the framework introduced by the BSA 2022 has been fleshed out by multiple pieces of secondary legislation which have expanded upon and contain the detailed rules of the new regulatory regime.

The BSA 2022 is intended to ensure a step change as to how building and fire safety is managed, particularly in high-rise occupied buildings. Its ambit is wide, and goes beyond construction to cover other areas as well (such as the creation of the Building Safety Regulator, the National Regulator of Construction Products and the New Homes Ombudsman, as well as covering occupied buildings and landlord and tenant issues and the inclusion of new statutory rights of action and extended limitation periods for parties seeking redress for past building safety defects).

The entire scope of the BSA 2022 is, despite its importance, beyond the ambit of this guidance. There are several publicly available guides which provide an overview of the BSA 2022¹. This guidance focusses on the particular parts of the BSA 2022 that are most relevant to those considering the carrying out of construction works and preparing contracts for the carrying out of those works.

This guidance is intended to provide information only and concerns the regime in England. The details and information provided are up to date at the time of publication (April 2024). This guidance does not constitute advice. Please obtain appropriate professional advice if required.

Compliance with the BSA 2022 and related legislation

The BSA 2022 and related legislation (whether that be statutory instruments or amended Acts of Parliament or regulations) fall within the definition of “Statutory Requirements” which is included across the JCT suite of contracts². The JCT suite of contracts requires the Contractor to carry out the Works in compliance with the Statutory Requirements³. As such compliance with the BSA 2022 and related legislation is required by the terms of JCT contracts.

Given this overarching requirement, JCT has taken the view that for the most part it would not be helpful – and indeed that it may be counterproductive – to pick out and refer to particular parts of the BSA 2022 and related legislation within the JCT contracts.

The main exception to this is the new dutyholder regime.

¹ See for example buildingsafety.campaign.gov.uk, hse.gov.uk/building-safety

² See for example clause 1.1 in JCT DB 2024

³ See for example clause 2.1.1 in JCT DB 2024

The New Dutyholder Regime

Sections 34 and 35 of the BSA 2022 and Part 2A of the Building Regulations 2010 (inserted as a result of The Building Regulations etc. (Amendment) (England) Regulations 2023) introduced a new dutyholder regime, placing legal responsibilities concerning building safety risks on those who commission building work and participate in the design and construction process.⁴ The regime applies to all construction work save where the work is non-notifiable.

Dutyholders include the client (for whom the building work is being done), designers (anyone who carries out any design work, or arranges for or instructs someone under their control to carry out design work) and contractors (any person who, in the course or furtherance of a business carries out, manages or controls any building work). Where there is to be more than one designer the client must also appoint a principal designer (to be in control of all the design work), and where there is to be more than one contractor a principal contractor (to be in control of the whole project during the construction phase).

Each dutyholder holds specific duties, with their responsibilities being greater in relation to the construction of higher-risk buildings (as to which, please see below). An important part of the new dutyholder regime is that everyone doing design or building work must be competent, and demonstrate their competence, to do their work in compliance with building regulations.

These dutyholder roles align with but are distinct from those which apply in respect of the Construction (Design and Management) Regulations 2015. As a result, JCT has adopted the approach within its contracts of treating the BSA dutyholder regime in the same way as the CDM dutyholder regime:

- A new Article has been included providing for the appointment of a Principal Designer and Principal Contractor for the purposes of the Building Regulations⁵.
- Specific references to the relevant Building Regulations applicable to contractors and designers (and where relevant Principal Designers and Principal Contractors) have been inserted into the clause in the JCT contracts which previously dealt with the equivalent requirements in respect of the CDM Regulations⁶.
- Otherwise, where specific references have been made to parts of the CDM Regulations within the JCT terms, references to their closest equivalent provisions under the Building Regulations have been added⁷.

For more detailed guidance on BSA terms in each JCT contract, please see the relevant contract guide.

Higher-Risk Buildings

The BSA 2022 has introduced a more stringent regulatory regime for Higher-Risk Buildings (HRBs), as these were seen to be most affected by fire safety issues due to their height and the consequent difficulties in ensuring the safety of their inhabitants.

The definition of a “higher-risk building” for the design and construction phase of a building is found in section 31 of the BSA 2022 and regulations 2 and 7 of the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023/275. In general terms, they are buildings of at least 18 metres in height or at least seven storeys and which comprise two or more residential units and include care homes and hospitals. Certain buildings (such as hotels and military barracks) are excluded.

⁴ Building Regulations 2010, regulations 11A to 11Q

⁵ See for example Article 7 in JCT DB 2024

⁶ See for example clause 3.16 in JCT DB 2024

⁷ See for example clause 2.7.2 in JCT DB 2024

JCT has not included contract terms that cover the regulatory regime applicable to HRBs, as design and construction work relating to HRBs is just one type of project for which JCT contracts may be used. Nonetheless, if parties are engaged in design and construction work either to construct an HRB or to turn an existing building into an HRB, or to carry out works within an HRB, there are aspects of the statutory HRB regime that they may wish to provide for within their contract documentation.

The main areas are set out below.

The Golden Thread

Under the BSA 2022 and the related Building (Higher-Risk Buildings Procedures) (England) Regulations 2023 (SI 2023/909) (Part 4), dutyholders are required to contribute to the golden thread of information during the design and construction phase. The BSA 2022 and the Higher-Risk Buildings (Management of Safety Risks etc.) (England) Regulations 2023 (SI 2023/907) and the Higher-Risk Buildings (Keeping and Provision of Information etc.) (England) Regulations 2024 (SI 2024/41) also impose an obligation on the accountable person⁸ to keep and maintain the golden thread of information during the occupation phase. Broadly, the intent is to create, collate, share and maintain prescribed documents and information from initial design intent through to construction and subsequently to cover any changes that occur throughout occupation – the “golden thread” – so as to ensure that key information is created, recorded, stored and managed to allow all relevant people to access and share this information when required.

The Building (Higher-Risk Buildings Procedures) (England) Regulations 2023 (SI 2023/909) include certain principles that must be adhered to to ensure the intent is achieved and include for example requirements that the information must be stored digitally and be secure, accurate and kept up to date.

Given the importance of this information and that it must be available to parties (including the accountable person) prior to occupation, parties may therefore wish to consider whether to include obligations in their contract documents setting out what information is to be provided and in what digital format, and when it is to be provided, so that all parties are clear as to what is required. Parties may also wish to include this information as part of the documentation to be provided prior to practical completion⁹.

The Gateway Regime

Section 33 BSA 2022 enabled a new gateway system of regulatory checks for all HRBs. At each gateway of the design, construction and refurbishment phases of a project, the BSA 2022 regime requires dutyholders to demonstrate to the Building Safety Regulator that they can account for the safety of the project and the completed building.

Gateway one occurs at the planning stage of a project and requires consideration of fire safety issues which impact on planning and requires a Fire Safety Statement to be prepared which sets out project-specific fire safety considerations. It was introduced by the [Town and Country Planning \(Development Management Procedure and Section 62A Applications\) \(England\) \(Amendment\) Order 2021](#) under the Town and Country Planning Act 1990 and has applied to planning applications made since 1 August 2021.

The detailed provisions relating to gateways two and three were introduced in the Building (Higher-Risk Buildings Procedures) (England) Regulations 2023 (SI 2023/909).

⁸ As defined in the Building Safety Act s.72

⁹ See for example clause 2.37 in JCT DB 2024

Gateway two occurs before the construction stage of a project and requires the dutyholders to apply for and obtain building control approval from the Building Safety Regulator, which must be provided before construction work can commence. Information to be submitted to the Regulator at this stage includes a description of the proposed work, fire safety compliance information and a statement concerning golden thread arrangements.

For most construction contracts, gateways one and two will already have passed before those contracts come into effect and will therefore not need to be dealt with in those contracts. There are, of course exceptions. For example, services concerning gateways one and two may well be included in consultant appointments and in pre-construction services agreements with contractors. There may also be circumstances where a construction contract is entered into prior to gateway two having been passed and in that case gateway two would need to be considered and addressed as part of the contract terms for that contract. Also, if a client wishes to instruct a major change under its contract that will require a change control application and approval this must be obtained prior to commencement of the affected work.

Gateway three occurs at completion of a project, and requires the Building Safety Regulator to assess whether the project has been completed in accordance with the wider BSA 2022 regime and any other applicable building safety regulations. The building cannot be occupied until the Building Safety Regulator has issued a completion or partial completion certificate for the work and it has been registered with the Building Safety Regulator.

Issues that may arise in relation to the gateways include:

- who has the responsibility for obtaining the Building Safety Regulator's approval and for liaising with the Regulator in relation to it;
- how practical completion is to be treated in light of the requirement to obtain the Regulator's approval before the building can be occupied;
- the risk of delays in obtaining the Regulator's approval.