

CONSTRUCTION : BULLETIN



JCT Minor Works 2016 – What Has Changed?

JCT has now begun publishing the 2016 edition of its construction contracts in a phased roll-out, beginning with the Minor Works Building Contract (MW), the Minor Works Building Contract with contractor's design (MWD) and the Minor Works Sub-Contract with sub-contractor's design (MWSUB/D). In this bulletin, we take a look at the key changes that have been made to these contracts.

New 'Interim Valuation Dates'

A new 'Interim Valuation Date' ('IVD') has been introduced in all the contracts. The IVD must be specified in the Contract/Sub-Contract Particulars and should be the same at both Main Contract and Sub-Contract level to reflect fair payment principles. In the Main Contracts, the due date for payment is 7 days after the IVD, and in the Sub-Contract, the due date for payment is 12 days after the IVD.

Simplified Main Contract payment process

The 2011 editions of MW and MWD had a clause 4.3 dealing with interim payments at monthly intervals before practical completion and a clause 4.4 dealing with interim payments at two monthly intervals after practical completion. The payment process in MW and MWD 2016 has been simplified so that interim payments are now dealt with in the same way before and after practical completion.

JCT have also carried out a consolidation exercise so that there is now only one set of provisions dealing with payment notices, pay less notices and interest for late payments. As a result of this consolidation exercise, the payment terms in the Main Contracts now refer to "the paying Party", envisaging the possibility of

payment being made by either Party. Whilst we expect JCT only intend payments to be made by the Contractor to the Employer at final account stage, this change could make it easier for Employers to recover overpayments to the Contractor following successful 'no interim certificate/pay less notice' adjudications.

Applications for payment

In the Main Contracts, the Contractor is now permitted to make applications for payment prior to the IVD. Minor Works 2011 was unusual amongst JCT contracts because the Contractor had no express contractual entitlement to make applications for payment. Contractors working under MW and MWD 2011 were often disappointed to learn that their applications for payment had not become due 'by default' where no interim certificate or pay less notice had been issued because the application was not recognised under the Contract. Under MW and MWD 2016, it will be easier for Contractors to make this kind of claim.

However, the Sub-Contract has not been similarly amended, so Sub-Contractors remain technically unable to make applications for payment prior to the IVD and any applications which are made continue to have no contractual standing under the terms of the Sub-Contract.

Sub-Contract final date for payment

In the Sub-Contract, the final date for payment has been reduced to 14 days after the due date (it was previously 21 days). This is the same payment period as in the Main Contracts, and is presumably linked to the fact that there are now 12 days between the

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IVD and the due date for payment in the Sub-Contract.

Main Contract insurance

A common problem across many JCT Main Contracts is that the insurance arrangements for existing structures are unsuitable where the Employer is unable to insure the existing structures (e.g. where the Employer is a tenant undertaking works in a property insured by the landlord).

In MW and MWD 2016, JCT have addressed this issue by scrapping the old clause 5.4C (which provided for the Employer to insure the existing structures in his own name rather than in joint names) and replacing it with a new clause “Insurance of the Works and existing structures by other means”. This clause allows the parties to set out their own bespoke insurance arrangements in the Contract Particulars.

Whilst this new approach promotes flexibility, it will be important for parties using clause 5.4C to describe their insurance arrangements in sufficient detail to avoid gaps in insurance coverage. Simply writing something like “to be agreed” in the Contract Particulars will not be good enough. The Guidance Notes accompanying the Main Contracts stress the need for Employers to take specialist insurance advice when using clause 5.4C.

Loss or damage

The Main Contracts now include new clauses 5.6 and 5.7, which address what happens when there is loss or damage to the Works and/or existing structures and permit the Employer to terminate where there is loss or damage to existing structures. Minor Works 2011 was silent on this issue.

Public Contracts Regulations 2015

Where the Employer is a Local or Public Authority (as newly defined in clause 1.1), the Main Contracts comply with regulation 73(1) of the Public Contracts Regulations 2015 (the ‘PC Regulations’), which requires a contracting authority to be able to terminate a public contract in certain circumstances. As a result, there are

three new rights of termination for the Employer:

- termination under clause 6.6 where the Contractor should have been excluded from the procurement procedure due to corruption or similar offences;
- termination under clause 6.10.3 where the Contract has been subject to a substantial modification which requires a new procurement procedure; and
- termination under clause 6.10.3 where the European Court of Justice has decided that the Contract should not have been awarded due to a serious infringement of the PC Regulations.

The Main Contracts also include two new Supplemental Provisions. Supplemental Provision 7 relates to the Freedom of Information Act 2000 and only applies where the Employer is a Local or Public Authority or other similar body. Supplemental Provision 8 will only apply where the Contract is governed by the PC Regulations and requires the Contractor to ensure his sub-contracts contain certain provisions necessary to comply with the PC Regulations.

In the Sub-Contract, the PC Regulations are dealt with in new Supplemental Provision 7, which deals with termination of the Sub-Contract where the Main Contract is terminated for reasons linked to the PC Regulations. It also requires the Sub-Contractor to ensure his sub-subcontracts contain certain provisions necessary to comply with the PC Regulations.

Other changes

There are many other more minor changes, including:

- Minor changes in the wording of numerous clauses.
- The incorporation of JCT Amendment 1 so that the 2016 editions tie in with the CDM Regulations 2015.
- A new clause 1.7 in the Main Contracts which provides that the consent or approval of either Party or the Architect/Contract Administrator must not be unreasonably delayed or

withheld, except in certain specified circumstances.

- A new 2016 edition of the JCT Construction Industry Model Arbitration Rules (‘CIMAR’), which is incorporated into the arbitration clauses.
- The re-drafting of the Recitals and Articles in the Sub-Contract, resulting in eight Recitals rather than six and seven Articles rather than six.
- An option to execute the Sub-Contract as a deed.
- New clauses 2 and 3 in the Sub-Contract dealing with interpretation, which has a knock-on effect on the numbering of the other Sub-Contract clauses.
- Changes to the variation provisions in the Sub-Contract so that the Contractor may also instruct variations to the order or manner in which the Sub-Contract Works are carried out and the Parties are required to try to agree a price for variations (this better reflects the Main Contract variations clause).
- New definitions of ‘Contractor’s Persons’ and ‘Employer’s Persons’ in the Main Contracts.
- New wording in clause 2.11 of the Main Contracts which allows an appropriate deduction from the Contract Sum to be made where the Contractor is instructed not to make good defects.

What’s next?

We understand the next new JCT contracts to be published will be the Short Form of Sub-Contract and the Sub-Subcontract, followed by Design & Build, but no publication dates have yet been confirmed. We will be issuing further bulletins on the changes to each form of contract as they are published.

This bulletin contains information of general interest about current legal issues, but does not provide legal advice. It is prepared for the general information of our clients and other interested parties. This bulletin should not be relied upon in any specific situation without appropriate legal advice. If you require legal advice on any of the issues raised in this bulletin, please contact one of our specialist construction lawyers.