

CONSTRUCTION : BULLETIN

JCT Design & Build 2016 – What Has Changed? Part One

JCT has now published the 2016 edition of the Design and Build Contract together with the Design and Build Sub-Contract Agreement and Conditions. There have been numerous changes to the wording of the contracts and in this first bulletin in a series of two we will be looking at the key changes that have been made to the Design and Build Contract.

New 'Interim Valuation Dates'

As we have reported previously, a new 'Interim Valuation Date' ('IVD') has been introduced in all the editions. JCT believe that including the same IVD at main contract, sub-contract and sub-subcontract level will promote fairer payment down the supply chain, but it appears there will be limited benefit to sub-contractors unless main contractors decide to adhere to the JCT payment periods rather than substantially extending them, as is currently common.

The IVD must be specified in the Contract Particulars regardless of whether Alternative A (Stage Payments) or Alternative B (Periodic Payments) applies. The IVD acts as both the trigger for the due date for payment and the point in time at which the Gross Valuation is calculated.

The due date for payment is 7 days after the IVD or, if the Contractor's Interim Payment Application is submitted later than the IVD, 7 days after the Employer's receipt of the Interim Payment Application.

Simplified payment process

JCT have made an effort to simplify the clauses relating to payment. Section 4

of the Conditions has been re-structured into eight shorter sub-sections and some of the clauses have been moved into a different order. Notably, the provisions relating to the Final Statement have now been moved to clause 4.24 at the end of the payment section, presumably because JCT considered it logical to deal with the Final Statement last.

The substantive changes to the payment terms include the following:

- Clause 4.2 (Items included in adjustments) has been significantly shortened.
- Clause 4.7.2 provides for interim payments to become due at monthly intervals all the way up to the due date for the final payment, which is much simpler than the old approach of having due dates at monthly intervals before practical completion and at two-monthly intervals after practical completion.
- Clause 4.9 deals with the giving of Pay Less Notices in relation to both interim payments and the final payment in order to minimise repetition.

In addition, the previously rather complicated clause 1.8, which deals with the Final Statement becoming conclusive, has also been simplified and shortened.

Loss and expense

There is a new clause 4.20 entitled 'Notification and ascertainment' which sets out a new procedure for notifying and ascertaining loss and expense claims.

The Contractor is required to notify the



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Employer as soon as the likely effect of a Relevant Matter on regular progress becomes (or should have become) reasonably apparent to him. The notification must be accompanied (or followed as soon as reasonably practicable thereafter) by the Contractor's initial assessment of the loss and/or expense incurred and any further amounts likely to be incurred, together with such information as is reasonably necessary for the Employer to ascertain the loss and/or expense incurred. The Contractor is thereafter required to update the assessment and information at monthly intervals until all information reasonably necessary to allow ascertainment of the total amount of loss and expense has been supplied.

Following receipt of the initial assessment and information, the Employer has a period of 28 days to notify the Contractor of the ascertained amount of loss and/or expense. The Employer must similarly notify the Contractor of his ascertainment within 14 days of receipt of each monthly update of the assessment and information. Each ascertainment must be made by reference to the information supplied by the Contractor and be in sufficient detail to allow the Contractor to identify differences between the Employer's ascertainment and the Contractor's assessment.

This new procedure clearly imposes stricter requirements on both parties, particularly the Employer, in relation to the ascertainment of loss and/or expense. Employers and consultants performing the role of Employer's Agent will need to make sure that their ascertainments are properly detailed in order to minimise challenges from Contractors.

Fluctuations

There is now greater flexibility for the Fluctuations Options. As well as the existing Fluctuations Options A, B and C, there is an option to specify in the Contract Particulars that no Fluctuations Provision applies. There is also a new option for the parties to specify their own fluctuation/price adjustment formula rather than using the JCT formulas.

Performance bond and parent company guarantee

A new clause 7.3 permits the Employer to require the Contractor to provide a performance bond and/or parent company guarantee by completing the Contract Particulars appropriately. Interestingly, JCT has chosen not to produce any specimen forms of performance bond or parent company guarantee, so the parties must agree on their own wording and attach it to the Contract.

In relation to the performance bond, there is space in the Contract Particulars to specify the bond amount and its expiry date. The Contract Particulars also assume that the bond amount will reduce by 50% at practical completion if the bond is to remain in force following practical completion, though many Employers may not wish to allow for such a reduction.

In relation to the parent company guarantee, there is space in the Contract Particulars to state the name and company registration number of the Contractor's parent company.

Clause 7.3 does not include any particular sanction for failure to provide a performance bond and/or parent company guarantee, so Employers who are used to the provision of a performance bond and/or parent company guarantee acting as a condition precedent to payment will no doubt be seeking to amend clause 7.3 to allow payment to be withheld.

Collateral warranties and third party rights

For the first time, there is the option to request third party rights from sub-contractors instead of collateral warranties. Clause 7E has been rewritten to require the Contractor to procure collateral warranties or third party rights from sub-contractors, depending on what is required.

Part 2 of the Contract Particulars has been removed from the 2016 edition. The Employer is now required to set out his requirements for collateral warranties and third party rights in a 'Rights Particulars' document which must be attached to the Contract. The

Contractor will need to produce a similar document to include in his sub-contracts.

The Rights Particulars document must identify:

- the beneficiaries who will require warranties or third party rights, identified by name or by a generic description (e.g. 'Funder', 'Purchaser' and 'Tenant');
- whether the Contractor is to provide collateral warranties or third party rights (or a mixture of both);
- the sub-contractors who are to provide collateral warranties and/or third party rights;
- the level of professional indemnity or public liability insurance cover required from sub-contractors; and
- any other details needed to complete the terms of the warranties or third party rights that are to be given.

Clause 7.4.2 allows the Contractor to choose whether to provide collateral warranties or third party rights if the Employer has failed to specify one or the other in the Rights Particulars.

JCT have produced a sample 'Model Form Rights Particulars' document which is included in the new Design and Build Contract Guide 2016 and available on their website (www.jctltd.co.uk). This may be a useful starting point for Employers seeking to produce their own bespoke Rights Particulars documents.

Part Two coming soon

Look out for Part Two of this bulletin on more of the changes to the Design and Build Contract and the changes to the Design and Build Sub-Contract Agreement and Conditions.

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