

Paying the Nominated Sub-Contractor

By James P. Morris, FRICS, ACI Arb

This seemingly straightforward activity has been made somewhat confused by recently published opinions in various trade journals; this article attempts to clarify the position and show how the rights and obligations of the parties, set out in the JCT Conditions of Contract and in the Standard Form of Contract for Nominated Sub-Contractors (the "Green Form"), are inter-related.

Clause numbers refer to the JCT Standard Form of Building Contract unless otherwise stated.

Since this article was drafted, it has been stated that the new edition of the JCT Form of Contract will be published early in 1980. This article may serve to pinpoint the areas of doubt which should be examined in the new JCT Form to study the tribunals' solution of them.

Interim Payments

There are two stages in this process:—

1. Ascertainment of the amount payable by the Employer to the Contractor.
2. Ascertainment of the amount payable by the Contractor to the Sub-Contractor.

1. Amount Payable to the Contractor

This is made up as follows:—

- (a) Total value of work properly executed and of materials and goods delivered to or adjacent to the works etc. for use thereon, less any amount which may be retained by the Employer as provided for in Clause 30(3).
- (b) Any amounts to be added under Clause 11(6), properly claimed by the Contractor and ascertained by the Architect or Quantity Surveyor.
- (c) Any amounts to be added under Clause 24(1), similarly claimed by the Contractor and ascertained by the Architect or Quantity Surveyor.
- (d) Any amount payable to or allowable by the Contractor by virtue of Clauses 31 A or 31 B, 31 C, 31 D, 31 E, which has been claimed by the Contractor and computed or agreed by the Quantity Surveyor and Contractor, and added to the amount of the Interim Certificate. (Where fluctuations are subject to Clause 31F, this is dealt with below).
- (e) From the total of these amounts is to be deducted the instalments previously paid under Clause 30(2).

Since all the work is, by Clause 1(1), to be carried out and completed by the Contractor, it follows that the amounts ascertained as due in the Interim Certificate must include that of both the Contractor's own work and that of the Nominated Sub-Contractor, and any amounts to be added as ascertained under Clauses 11(6) and 24(1) must include amounts properly in-



James P. Morris

Mr. Morris is a lecturer in the Building Economics Section of the Scott Sutherland School of Architecture in Robert Gordon's Institute of Technology in Aberdeen and specialises in practice matters.

curring by the Nominated Sub-Contractor under the provisions of the Sub-Contract "Green Form" viz 10(d) and 8(c)(i).

Note, however, that any amount to be added to the amount as ascertained as due in the Interim Certificate under Clauses 31 A, or 31 B, 31 C, 31 D, 31 E, is by 31 D(5)(b) specifically to exclude fluctuations due to the Nominated Sub-Contract Work, stating that "... Fluctuations in relation to Nominated Sub-Contractors ... shall be dealt with under any provision in relation thereto which may be included in the appropriate Sub-Contract ..."

The Green Form does so contain provisions in relation to fluctuations; these are Green Form Clauses 23 A, 23 B, 23 C, 23 D and 23 E which are *mutatis mutandis* the same as Clause 31 A, 31 B, 31 C, 31 D and 31 E. It will be necessary then, that fluctuations in relation to the Nominated Sub-Contractor be dealt with by inclusion with the work done by the Nominated Sub-Contractor (since they will not be dealt with as part of the Contractor's fluctuations).

Green Form Clause 23 D(4)(c) states that the amount which is payable in respect of the Nominated Sub-Contractor's fluctuations are to be added to the sum ascertained as due in the next Interim Certificate (i.e. not subject to retention) and as Green Form Clause 23 D(4)(c)(ii) states that such additions to the contract sum made in respect of the Nominated Sub-Contractor's fluctuations are not to alter in any way the

amount of profit of the Nominated Sub-Contractor in that sum and since under Green Form Clause 11(b)(ii) the Nominated Sub-Contractor has to allow the Contractor 2½% discount for cash on the amount of Fluctuations included in the Nominated Sub-Contractor's Certificate, then this must be allowed for by adding 1/39th to the amount of the Nominated Sub-Contractor's fluctuations. The amount of these fluctuations will form part of the amount payable to the Nominated Sub-Contractor under Clause 35(c) and on which will be allowed Contractor's profits.

The Architect is obliged by Clause 27(b) to direct the Contractor as to the total value of work, materials or goods executed or supplied by a Nominated Sub-Contractor included in the amount stated as due in the Interim Certificate.

Since the Contractor is entitled to deduct only (i) retention as appropriate, (ii) any sums due from the Nominated Sub-Contractor for delays and (iii) Discount for cash; then the amount so directed by the Architect must not include a deduction for retention i.e. it must be the gross amount, and must have amounts previously paid (i.e. gross amounts without deduction for retention) deducted from it.

e.g. 1st Month:

Nominated Sub-Contractor's Amount of Works etc. done to date	£100
Deduct Retention @ 3%	3
Nett total value	£97
Deduct Previous Payments	NIL
Nett Amount Due	£97

The Architect's direction to the Contractor as to amount due would be £100
Deduct Previous Gross Payment NIL

Direction as to Gross Due £100

From this amount the Contractor would deduct retention @ 3% giving a Nett payment of £97 (on which discount for cash would be allowed if paid in time.)

2nd Month:

Nominated Sub-Contractor's Amount of Works etc. done to date	£200
Deduct Retention @ 3%	6
Nett total value	£194
Deduct Previous Payments	£97
Nett Amount Due	£97

The Architect's direction to the Contractor as to amount due would be £200
Deduct Previous Gross Amount £100

Direction as to Gross Due £100

From this amount the Contractor would deduct retention @ 3% given a Nett payment of £97 (less discount).

The amounts claimed by the Contractor under Clause 11 (6) will include any such sums claimed by the Nominated Sub-Contractor under the Green Form Clause 10 (d) and since the Nominated Sub-Contractor is obliged by Clause 11 (b) to allow a 2½% discount for cash on that amount, the main Contractor will have to add 1/39th to the amount when putting forward his claim under Clause 11 (6). Nothing is mentioned in the Conditions regarding the Interim Payment about the Main Contractor's profit on such a claim but 30 (5) (c) permits the addition of the Contractor's profit *pro rata* at Final account stage (claims under Green Form 10 (d) will be included in the amounts paid or payable to the Nominated Sub-Contractor and it is such amounts paid or payable that attract the Main Contractor's profit). It appears sensible, therefore, to allow for Contractor's profit on such amounts claimed in Interim Payments.

Similarly, amounts claimed by the Contractor under Clause 24 (1) will include any such sums claimed by the Nominated Sub-Contractor under Green Form Clause 8 (c)(i) and will require 1/39th to be added for Main Contractor's discount for cash and, on the same basis as outlined above, have Contractor's profit added.

The direction given to the Contractor by the Architect as obliged by Clause 27 (b) as to the value of Nominated Sub-Contractor's work etc. included in the Interim Payment will not include these amounts of fluctuations, claims made and ascertained under Clauses 11 (6) and 24 (1), but as the Contractor himself put forward and substantiated these amounts, they will be known to him and he will add them to the amount directed of work done etc. when paying the Nominated Sub-Contractor.

To "re-cap" — Included in the Contractor's Interim Certificate will be:—

- (i) Value of Work etc. properly executed by the Nominated Sub-Contractor which will be subject to retention
- (ii) Nominated Sub-Contractor's fluctuations in accordance with Green Form Clauses 23 A, B, or C, as appropriate plus the addition under Green Form Clause 23 E and plus 1/39th
- (iii) Nominated Sub-Contractor's claims made under Green Form Clauses 10 (d) and 8 (c)(i) plus 1/39th
- (iv) Main Contractor's profit on (ii) and (iii)

It should be noted that any amounts claimed by the Nominated Sub-Contractor from the Contractor under Green Form Clause 8 (c)(ii) would not be claimable by the Contractor under 24(i) and, therefore, not be ascertained by the Architect or the Quantity Surveyor (Clause 8 (c) (ii) differs from 8 (c)(i) in that it does not require the Contractor to enforce or make available any benefit of any right under the main contract. That right, under 8 (c)(i), is enforceable by the Nominated Sub-Contractor against the Contractor under Green Form Clause 12).

Where Fluctuations on the main contract

are under Clause 31 F, the Nominated Sub-Contractor's fluctuation will, in normal circumstances, be subject to the provisions of Green Form Clause 23 F, and the Contractor's fluctuation will include Nominated Sub-Contractor's fluctuations. The "Price Adjustment formulae for Building Contracts — A guide to the practical application of the Formula" published HMSO at para 1.16 states "The amounts calculated by application of the formulae to sub-contracts will be subject to the same percentage cash discounts to the main Contractor for prompt payment as applies to the remainder of the Sub-Contractor's accounts. Unless otherwise stated in the contract, the main Contractor's percentage profit will be applied to the total amount payable to his Nominated Sub-Contractors, including sums payable in respect of price fluctuations"; and at para 2.33 states "Unless otherwise stated in the Contract, any amount due in respect of price fluctuations will be treated as being part of the value of the work executed for the purpose of calculating retention monies".

The effect of these rules and the direction given in the guide is as follows:—

- (a) the value of the work executed etc. under Clause 30(2), including that of the Nominated Sub-Contractor, must include 31 F fluctuations (i.e. which will include Green Form Clause 23 F fluctuations)
- (b) the Nominated Sub-Contractor's proportion of these fluctuations will *NOT* have 1/39th added, (because the formulae adjustment operates on value of work which already includes for the discount)
- (c) the Nominated Sub-Contractor's proportion of these fluctuations must have Contractor's profits added
- (d) all of this i.e. (a) to (c) is subject to retention.

It should be noted that 31 D(4)(c)(ii), which stipulates that fluctuations are paid nett, only applies to the operation of 31 A or 31 B and not to those calculated in accordance with 31 F. Similarly, the addition made under 31 E does not apply to amounts calculated under 31 F.

2. Amount Payable to the Nominated Sub-Contractor

The amounts payable by the Contractor to the Nominated Sub-Contractor are governed by Green Form Clause 11, as modified by Green Form Clauses 8, 10, 13A, 13B, and the appropriate fluctuations Clauses viz. 23 A, C, D, E, or 23 B, C, D, E, or 23 F.

The total amount due to the Nominated Sub-Contractor included in the Contractor's Interim payment in respect of work done and of variations authorised and executed, and of relevant materials on and off site, will have been notified by the Architect to the Contractor and to the Nominated Sub-Contractor. To this amount will be added the amounts claimed by the Nominated Sub-Contractor, through the Contractor, in accordance with Green Form Clause 11(a) for

- (i) the amount of claims ascertained under Green Form Clause 8(c)(i),

- (ii) fluctuations.

Under Green Form Clause 11(b) there must also be included:—

- (iii) amounts ". . . ascertained under Clause 8(c) . . ." but since the amounts under Green Form Clause 8(c)(i) have already been added at (i) above, the reference to Clause 8(c) here must mean that under Green Form Clause 8(c) (ii) which would be due to the Nominated Sub-Contractor and that under Green Form Clause 8(c)(iii) which would be due from the Nominated Sub-Contractor and under Clauses 27(b).
- (iv) any amounts due under Green Form Clause 8(a) provided a certificate in accordance with the proviso to Green Form Clause 8(a) is obtained.

From this total will be deducted:—

- (v) the proportion of the retention money attributable to the Sub-Contract viz:— the value of the work and materials etc., and on fluctuations if arising out of the operation of Green Form Clause 23 F (but not if arising out of the operation of Green Form Clauses 23 A, C, D, E, or 23 B, C, D, E) and
- (vi) a discount of 2½% for cash if payment is made within 14 days (the 14 days is from the date of the Contractor receiving his certificate, not the date of the Contractor receiving his "payment" money) and
- (vii) the amounts previously paid. It should be noted that the amounts stated by the Architect as due under Clause 27 (b) will already have the previous amounts deducted since the Contractor, by Clause 27(b), may only deduct therefrom (i) retention (ii) any sum to which the Contractor may be entitled to deduct under the terms of the Sub-Contract with regard to delay (iii) discount for cash (nothing, as will be noticed, for previous payments; such direction of amount as due must mean due in that certificate with the previous payments already deducted from the total value of work etc.)

It should be noticed that whereas Clause 27(b) permits the Contractor to deduct from the amount certified for the Nominated Sub-Contractor's/Sub-Contractor's work etc. (a) retention and (b) discount for cash, it also permits a deduction of (c) ". . . any sum to which the Contractor may be entitled in respect of delay in the completion (my italics) of the Sub-Contract work. . ." (and Green Form Clause 8(a) covers this ground). Green Form Clause 8 (c)(iii) permits the Contractor to deduct such sums agreed in respect of direct loss or expense incurred by the Contractor because *the regular progress* of the Main Contract Works is affected by acts etc. of the Nominated Sub-Contractor.

Four points here need to be considered: 1. While the completion may be effected on time by, say, catching up on progress because time allowances made in the Sub-Contract programme for inclement weather have not been required, the slow start made by the Nominated Sub-Contractor has affected the Main Contractor's progress and caused him direct loss or expense.

Green Form Clause 8(c)(iii) enables the Contractor to recover this loss despite lack of provision for it in the Main Contract.

2. The wording of Green Form Clause 8(c)(iii) permits the Contractor to regard the amount agreed in respect of this loss arising out of the regular progress "... as a debt due to the Contractor and *deducted from the Contract Sum*" (my italics). This is one of only two occasions when this method of recovery of Sums due to the Contractor is permitted, and it raises the question as to whether it is intended to keep the method of recovery outwith the provisions of Green Form Clause 13 A. Such an interpretation is unlikely since it is in regard to a matter which is likely to be contentious and unlikely to be agreed and it would, therefore, *a fortiori*, be likely to require the application of the procedures set out in Green Form Clause 13 B to enable the Contractor to safeguard the amounts claimed.

The adjustment of the Contract Sum by the deduction of the amount of claims (whether with or without the application of Green Form Clauses 13 A and/or Clause 13 B) also has the effect of denying the Contractor the payment of his loss or expense since by the strict wording of Clause 30(3) the Employer only pays the Contractor the amount of the Nominated Sub-Contractor that he (the Contractor) paid or is due to pay the Nominated Sub-Contractor! This interpretation, albeit contrary to common sense, is reinforced by the wording of Green Form Clause 10(a) where the reference is to an unqualified Clause 8(c). Adjustment of the Contract sum by deduction of claims would also have the effect of reducing the amount of the Contractor's profit on the Sub-Contract discount for cash!

3. Green Form Clause 13(a)(2)(a) covers monies due arising out of Green Form Clause 8(a); all other sums due and agreed are covered by Green Form Clause 13 A(2)(b) and (c).

4. It should also be noted that whereas Clause 27(b) gives the Contractor the right to deduct these Green Form Clause 8(a) amounts from the amount due to the Nominated Sub-Contractor by Interim Certificate, Green Form Clause 11 (b) makes no mention of it.

As regards the amounts which may be deducted by the Contractor from the amount payable to the Nominated Sub-Contractor under the provisions of the Green Form Clause 8(c)(iii) this is governed by Clause 13. If the amount has been agreed or determined by arbitration or litigation from any amount due to the Sub-Contractor under Clause 13 A(1).

In the case of amounts claimed for delay but not agreed, these too may be deducted provided (a) the Contractor has a certificate from the Architect certifying that the Nominated Sub-Contractor ought to have completed the work etc. on time *and* in all other cases where set-off is claimed but not agreed. (b) the amount of such a claim to be set-off has been quantified in detail and with reasonable accuracy by the Contractor *and* (c) the Contractor has given the

Nominated Sub-Contractor notice in writing of his intention to set-off the amount so quantified.

If the Nominated Sub-Contractor does not agree with the amount to be set-off as specified in the notice given under Green Form Clause 13 A(2)(c) then the provisions of Green Form Clause 13 B relating to the appointment of an Adjudicator and Trustee Stakeholder etc. comes into operation.

The amounts due to be added to or deducted from amounts due in the certificate arising out of Green Form Clause 9 relating to the cost making good defects and should not normally create any difficulty in their application.

Final Payment

This must be considered where (i) the final payment to the Nominated Sub-Contractor takes place at the same time as the Contractor's final payment and where (ii) the final payment to the Nominated Sub-Contractor takes place before final payment is due to the Contractor.

(i) **Final payment with Main Contract** Final Payment Clause 30(5)(c) makes it clear that in the settlement of accounts the amount paid or payable under the appropriate contract by the Contractor to the Nominated Sub-Contractor is to be set against the PC sum allowed, and allowing in all cases, *pro rata* for the Contractor's profit.

This means that the profit on the value of the work done etc. plus the amounts properly incurred and due to the Sub-Contractor under Green Form Clauses 10(d) 8(c)(i) and plus the appropriate fluctuation due under Clauses 23 A or B, C, D, E plus a 1/39th on these "added" amounts to cover for Contractor's discount or plus fluctuations under Green Form Clause 23 F, will be due to the Contractor i.e. profit on all amounts paid or payable.

Supposing the Contractor has been due and has paid to the Nominated Sub-Contractor amounts agreed under Green Form Clauses 8(c)(ii) and/or 8(c)(iii); would these be legitimately recoverable by the Contractor under Clause 30(5)(c) as amounts paid or payable to the Nominated Sub-Contractor? On the strict wording of Clause 30(5)(c), the answer would appear to be "yes" but since these amounts due under Green Form Clauses 8(c)(ii) and 8(c)(iii) arise as the result of the Contractor's (or those for whom the Contractor is responsible) act, omission or default affecting the regular progress of the Nominated Sub-Contract Work and so causing the Nominated Sub-Contractor direct loss or expense, the Contractor himself is in breach of Clause 21(1) (and the measure of the direct loss or expense to the Employer would include the amount so payable by him to the Contractor to pay the Nominated Sub-Contractor and which would be recoverable by the Employer in an action against the Contractor).

Green Form Clause 11(h) makes it clear that the retention money due to the Nominated Sub-Contractor is held as a trust fund and that the Contractor's interest in it is

that of Trustee for the Nominated Sub-Contractor. It may be noticed that the Sub-Contractor's interest in the retention fund is more secure than that of the Main Contractor. Under the Green Form Clause 11(h), if the Contractor attempts to mortgage or otherwise charge his (the Contractor's) interest in the retention fund (otherwise than by a floating charge on his assets, i.e. if the Contractor be a company), then the Contractor must set aside a sum equivalent to the retention money; this safeguard is not available to the Contractor under the Main Contract with regard to retention money held by the Employer.

Although Green Form Clause 11(h) makes no mention of the Contractor's right to have recourse to the retention money held on a trust for payment of any amount to which he is entitled from the Nominated Sub-Contractor, Clause 27(a)(viii) does give him such a right. Green Form Clause 13A does give him such a right provided he complies with the procedures set out in Green Form Clause 13A and 13B.

The case where the final release of retention is made before the final certificate, is not specifically covered in the Green Form conditions, but the principles set out in Green Form Clause 11 would apply and the amount of retention would be NIL, and there would be Contractor's discount for cash payable on the amount of such release of retention.

The case where the Nominated Sub-Contractor completes work after practical completion, Green Form Clause 11(f) enables the Nominated Sub-Contractor, through the Main Contractor, to make application to the Architect for an Interim Certificate to cover this work.

(ii) **Final Payment Before Main Contract** Final Payment Clause 27(e) permits the Architect to make a final payment to the Nominated Sub-Contractor before final payment is due to the Contractor. When this is done, the Contractor must receive from the Nominated Sub-Contractor an indemnity against latent defects. Green Form Clause 11(g) requires the Nominated Sub-Contractor to indemnify and secure the Contractor against all latent defects in the Sub-Contract, such security probably being by a Performance Bond similar to that in the ICE Conditions of Contract.

The retention money released in the payment must be passed on to the Nominated Sub-Contractor without deduction except for any amounts as set out in Green Form Clause 13A and 13B, and except for discount for cash if paid within fourteen days.

The question as to what extent, if any, the Employer's liability under the Main Contract is affected by the provisions of the Green Form, which form the basis of the contract between the Contractor and the Nominated Sub-Contractor, and to which the Employer is not a party, requires to be examined.

This situation arises as follows; the Employer through his Architect, approaches a specialist firm and requests it to quote for carrying out the work which is the subject