

A Review of the 1980 JCT Standard form of Contract

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Generally

A substantially revised edition of the JCT Standard Form of Building Contract has been awaited for such a long time that one may have been led to believe it would never come into existence. However, the time has arrived, the 1980 JCT Form has surfaced and, now that it has, much time will be spent perusing its contents.

Those who were hopefully awaiting this major change will not be disappointed by the fact that it is just that. The format in itself is a complete change, however, for those anticipating not only a major revision but a short succinct contract, improving dramatically upon its predecessor, it will probably, on first sight (and maybe thereafter), be extremely disappointing. Succinct it certainly is not; an improvement, perhaps only time will tell. This article is concerned primarily with identifying the major differences between the 1980 and 1963 Editions and not with the merits, or otherwise, of the latest forms, this aspect will be considered in a later article. In addition to the radical change of format, the 1980 form has been extensively revised in a number of areas, for example; valuation of variations and nominated sub-contractors. It has also undergone smaller drafting changes which, nevertheless, have a fundamental effect on the operation of the clauses. These changes are generally as a consequence of judicial decisions such as *Sindall (William) Ltd. v N. W. Thames Regional Health Authority (1977)* and *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd. (1970)*. Numerous other changes have been made which appear to be cosmetic.

The following observations are upon the Local Authorities with Quantities Edition.

Nominated Sub-Contractors

Clause 35 now incorporates the provisions on nominated sub-contractors, however, it is not all embracing as such matters as payment are dealt with under Clause 30. Clause 35 bears no resemblance to Clause 27 (1963) largely because the whole field of nomination has been changed. Not only has it been changed but the procedural aspects themselves have been incorporated in the contract itself and reference is made to a series of sub-contract documents namely:

- (i) Tender NSC/1 (Grey Form)*
- (ii) Agreement NSC/2 (Employer/Sub-Contractor Agreement)*
- (iii) Agreement NSC/2a (Employer/Sub-Contractor Agreement)*
- (iv) Nomination NSC/3 (Standard form of nomination)*



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- (v) JCT Nominated Sub-Contract NSC/4 (Green form)*
- (vi) JCT Nominated Sub-Contract NSC/4a (Green form)*

The foregoing are not completely new in as much as they correspond approximately to the documents referred to in brackets*, but they are more comprehensive and the contract formalizes the whole procedure by specific reference to them.

Basic Method of Nomination

The new contract provides for a basic method of nomination which is

- (i) a tender is sought on the Tender NSC/1 Form, the architect having completed schedule 1 (general matters). The Sub-Contractors will then submit their tenders on this form having completed the relevant parts, including schedule 1 Appendix A (fluctuations—list of basic prices and/or materials) or in conjunction with the Architect Schedule 1 Appendix B if formula adjustment is applicable.
- (ii) at the same time as inviting tenders the NSC/2 agreement should be entered into between the Employer and the Sub-Contractor.
- (iii) the contractor is then notified by the architect's preliminary notice of nomination (Clause 35.7.2) (note NSC/3 should not be used at this stage) that he is required to settle with the sub-contractor the matters referred to in Schedule 2 of NSC/1 ie. programming, attendance: The

contractor and sub-contractor upon agreement are required to sign the NSC/1 and return it to the architect.

- (iv) the architect may then nominate the proposed sub-contractor and this will be done using NSC/3.

Alternative Methods of Nomination

This alternative method can only operate where the contract bills or specification, or any instruction under Clause 13.2 requiring a variation or under Clause 13.3 on the expenditure of a provision sum state that Clauses 35.11 and 35.12 shall apply. This will exclude the need for use of NSC/1 and NSC/2. Under these circumstances a tender can be obtained by any means, however, a modified version of the NSC/2 agreement will be entered into, namely NSC/2a unless its use is specifically excluded in the invitation to tender. The sub-contract is also modified and an NSC/4a form is applicable.

Of course, if this is all too much, you can decide to go about nomination in any way you choose, but, remember the whole contract would require revision and this is a substantial task which may prove more difficult than operating the foregoing.

Provision is also made for the issue of a practical completion certificate (Clause 35.16) in respect of each nominated sub-contractor and further (Clause 35.17) permits final payment at any time after the issue of the foregoing certificate and in any event not later than 12 months from the date of the said certificate. There are many other aspects of nominated sub-contractors worth considering but space prevents this, however, it is worthwhile to note that re-nomination in the event of failure of the sub-contractor has now been specifically referred to in Clause 35.24, no doubt as a result of the Bickerton decision.

Before leaving this area one has to mention the fact that, the term 'Domestic Sub-Contractor' now appears in the contract (Clause 19.2) and covers, amongst other things, the situation where work measured in the Bills is required to be executed by a firm from a specified list.

Payment

The payment provisions are contained within Clause 30 (both editions—something has remained the same), however, the new edition has been substantially revised in an attempt to bring together all related matters. This is particularly so in the case of retention. It is no longer necessary to search the contract provisions to see if retention is applied to certain items, as the new form conveniently lists those items which are subject and those which are not subject to retention.

The provisions with regard to retention have been drafted to avoid the necessity

of issuing special certificates for the release of retention. Retention is held on the relevant items at the full percentage rate prior to practical completion, half the percentage rate after practical completion and before the Certificate of Completion of Making Good Defects, and at nil percentage thereafter. For the purposes of this clause partial possession of the works is deemed to be practical completion.

On the other hand, it is now necessary to separately identify retention held on the contractor and each nominated sub-contractor and this has been required to regularize the previous position with regard to the employer's interest as fiduciary as trustee for the Contractor and for any Nominated Sub-Contractor. Clause 30 also provides for the following:

- (i) certificates will be issued at the specified period up to and including the period which covers Practical Completion. (This is in line with Clause 31F (1963).
- (ii) the issue of an interim certificate, 28 days before the issue of the final certificate, in order that the outstanding balance due to Nominated Sub-Contractors may be released.

It is also worthy of note that the quantity surveyor is now given specific duties within this clause, ie. 30.1.2., 30.6.12.

Fluctuation

The clauses that deal with fluctuations are namely, 37, 38, 39 and 40. The first of these clauses (37) recognises the existence of fluctuations because the remaining clauses (38, 39 and 40) are published separately from the main contract, using a similar approach to that adopted under the I.C.E. and GC/Wks 1 contracts.

Clause 38 similar to 31B ... +C.D.E.

Clause 39 similar to 31A ...

Clause 40 similar to 31F ...

The choice of options available is made by identifying the appropriate clause in the Appendix of the Conditions by means of deleting those clauses which are not to apply.

It should be noted that Clause 37.2 states Clause 38 shall apply where neither Clause 39 nor 40 is identified in the Appendix.

The Clauses themselves have also undergone many changes in an attempt to reflect decisions of the Courts and current practices and these changes are well illustrated by consideration of Clause 39 (Traditional full fluctuations).

Clause 39

The prices contained within the bills of quantities are now based upon the operation of an incentive or productivity agreement which may be operated under the provisions and rules of the NJCBI or some other wage fixing body. Therefore, the 'Sindall' case ruling will not apply to this clause and the restriction on recovery of such fluctuations is removed.

Site Staff

Fluctuations in respect of non-working foremen, site agents and the like who are not defined as workpeople cannot under the

1963 Edition be recovered—31E was supposed to overcome this and other aspects of shortfall. Now site staff are to be treated in a similar way to workpeople (the definition of which is in Clause 39.7.3 and extended under Clauses 39.1.1.1 and 2 to cover those on site, adjacent to site and, more importantly, those employees directly employed by the Contractor who are engaged upon the production of materials or goods for use in connection with the Works and who operate neither on nor adjacent to the site . . .)

There are provisos and qualifying sub-clauses, and for the purposes of ascertaining recovery, periods of less than two days in any week are to be ignored and, further, part days cannot be aggregated to achieve the minimum period of two days.

Travelling Costs

The provisions in respect of travelling costs are new in as much as they are now specifically and separately identified and, furthermore, the new Clauses 39.1.5 and 6 now cover fares, contractors' own transport as

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well as travel allowances.

Where the contractor intends to use his own transport he will be required to submit a *list of basic transport charges* and this will presumably be in the form of an appendix to the bills of quantities. The operation of the basic transport charges is interesting and it leaves matters very much to the contractor and apparently even on matters of when and how much any subsequent increase will be, obviously care needs to be exercised with regard to this issue at tender stages.

Materials and Goods

The Clause covering materials and goods has been extended to cover fluctuations in electricity and, where specifically stated in the Contract Bills, also fuels.

Condition Precedent

Written notice of any event that gives rise to a claim for recovery of fluctuations must be given by the contractor within a reasonable time of the event and this notice is a condition precedent to payment. This situation is exactly the same as the previous edition.

Interestingly, a further provision has been introduced and this requires the contractor, where requested, to provide substantiation of any fluctuation claims. The

operation of this was not previously covered although in fact the procedure was frequently adopted, the difference now being that the Contractor has a contractual obligation. This principle is further extended to cover certification of site staff. The contractor is required to provide a signed certificate for each week identifying site staff employed.

Extension of Time

Fluctuation recovery is now frozen at contract completion date (date fixed for completion in the appendix of an extension thereof). This is a similar situation to Clause 31F(40) so long as two provisos are fulfilled; namely, Clause 25 (extension of time) is not amended or altered in any way and also that the Architect must have given consideration to every written submission for an extension of time.

All the fluctuation options are now consistent in that fluctuations are time restricted and that the Peak v McKinney decision is no longer applicable.

Clause 31E

This Clause has become an integral part of Clauses 38 and 39 and also appears in the Appendix as 38.7/39.8 in the same way as previously.

Clause 38 (Statutory Contributions)

This Clause has similar changes to Clause 39, but, of course, it excludes all those changes which are applicable to fluctuations in wages and market fluctuations in materials and goods.

Clause 40 (Formula)

The effect of this Clause is very much the same as 31F, it is comparatively shorter as much of the Clause now appears elsewhere in the Contract Conditions, eg. Clause 30 now deals with retention, Articles of Agreement—arbitration.

Retention

Retention is covered in the same way as the 1963 Edition, that is fluctuations arising under Clause 40 (formula) are subject to retention. Whereas, fluctuations arising under Clauses 38 and 39 are *not* subject to retention. Retention on nominated sub-contractors is administered in exactly the same way as for the main contract.

Variations

The term variation has been extended to incorporate "the addition, alteration or omission of any obligations or restrictions imposed by the Employer in the Contract Bills in regard to:

- (i) access to the site or use of any specific parts of the site
- (ii) limitations of working space or hours
- (iii) the execution or completion of the work in any specific order"

This widening of the Architect's powers allows him to make variations to these items where previously he could only do so by agreement and failing that if the Contractor was prevented by the Employer or his Agent from operating in accordance with the contract documents there would

have been breach of contract on the part of the Employer.

The previous rules of valuation appear to be incorporated in the revised wording, however, further detailed study might suggest that in practice the result obtained is unlikely to be the same. For example, Clause 11(4)(a) (1963) becomes 13.5.1.1 and now includes the proviso that the work does not significantly change the quantity of work in the Contract Bills. Where it does, Clause 13.5.1.2 becomes operative. When this is considered in conjunction with Clauses 13.5.3.2 and 13.5.3.3 which provide for allowances for lump sum adjustments and preliminaries, it becomes apparent that the whole nature of the clause has changed. This belief is further enhanced when Clause 13.5.5 is encountered, as this Clause provides that if a variation affects the conditions under which other work is executed, that work also becomes part of the variation and valued accordingly.

It should be noted that loss and expense is specifically excluded from this Clause by virtue of the fact that it is recoverable under Clause 26.2.7.

Other Matters

Obviously in an article of this nature it is only possible to refer briefly to some of the changes, however, one cannot conclude before mentioning that the extension of time provision (Clause 25) has been appreciably amended and primarily to over-



"Be patient about your suggestion, Smithers in 17 years or so it may well be revised again".

come the breach of contract situations that arise as a consequence of the inability to grant an extension for unspecified events and finally, that Clause 35 (1963), the Arbitration Clause has disappeared only to now appear as Article 5 in the Articles of Agreement.

Revised VAT Booklet

Following the changes in VAT registration limits announced by the Chancellor in his Budget statement, a revised edition of the booklet "Should I be registered for VAT?" has been issued by Customs and Excise.

Anyone who is starting in business or with an

existing business and is not already registered for VAT should read this booklet. It explains what VAT is and how to calculate whether it is necessary to apply for registration.

Copies of the revised booklet are available from any local VAT office.

IOB Launch New Information Service

Confirming its policy of producing information service papers for its members and the industry the IOB have recently launched the Surveying Information Service. The Service was initiated by the Surveying Practice Committee of the Institute under the Chairmanship of J. Myles Audus, MIOB and is aimed at those involved in quantity surveying matters in a building organisation. It will examine the duties and responsibilities of the builder's quantity surveyor and the financial and contractual matters associated with the role.

It is intended to produce up to four information papers annually and the first paper, written by Gordon P. Cottrell, MIOB, technical officer of the Institute, is entitled, 'The Builder's Quantity Surveyor'.

In his paper Mr. Cottrell describes the role of the builder's quantity surveyor, looks at the various management structures that exist within the surveying function, deals with the education and qualities required in the building quantity surveyor and gives an example, in the form of a job description, of the duties and responsibilities involved.

The paper is available, first copy free to members of the IOB and price £1.25 plus 25p postage to non-members, from the Sales Office, Institute of Building, Englemere, Kings Ride, Ascot, Berkshire SL5 8BJ. An annual subscription to the service if £5.00.

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