

The J.C.T. Standard Form of Contract 1980 Edition—Payments

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A new edition of the JCT Form of Contract, the 1980 edition, has now been published along with a Standard Form of Nominated Subcontract, this subcontract taking the place of the previous 'Green Form' issued under the sanction of the NFBTE and FASS and approved by CASEC.

The provisions of the 1980 JCT Form and the new Subcontract Form NSC/4 are closely linked together and contain changed and new clauses relating, inter alia, to the rules and procedures for payments for the main contract works and for subcontract works. This article attempts to explain and clarify the new provisions relating to interim and final payments.

Clause numbers, now in decimal format, are for the main contract. Those referring to the Subcontract form are prefaced NSC/4. References to 'Contract' and 'Contractor' mean Main Contract and Main Contractor respectively and references to Subcontract and Subcontractor mean Nominated Subcontract and Nominated Subcontractor respectively. Domestic Subcontracts, meaning non-nominated subcontracts are, it is understood, to be the subject of another Standard Form of Subcontract (to take the place of the existing 1972 'Blue' Form) and are not included in this article.

Both interim and final payments will be explained, examining each in two stages:

1. Ascertainment of amount payable by the employer to the Contractor.
2. Ascertainment of amount payable by the Contractor to Subcontractor.

INTERIM PAYMENTS

1. Amount payable to the Contractor

Clause 30 deals with Certificates and Payments in general and Clause 30.1 with Interim Certificates and Valuations in particular. The general scheme of payments is the same as before in that payment is made for work done and materials supplied, less retention, plus claims, fluctuations etc. and less, *not* previous payments, but amounts previously stated as due (whether the Employer has paid them or not).

Clause 30.2 spells out this arrangement in some detail. "The gross valuation shall be the total amounts referred to in clauses . . ."

(i) 30.2.1.1. The total value of work properly executed (including that to which Clause 13.5 applies—variations), adjusted by formula fluctuations if applicable. This clause applies to work done by the main contractor, including work executed by him which was the subject of a P.C. sum for which he tendered successfully. Clauses 35.2.1., 35.2.2. and 35.2.3. make it clear that in this case such work is not nominated subcontract work. Nominated subcontract work is excluded from this total value, being treated separately as will be seen shortly.

(ii) 30.2.1.2. The total value of materials delivered to or adjacent to the works; which



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still does not really sort out the question of ownership (Romalpa, etc.). Clause 16.1 may be interpreted as meaning that unless the contractor can give ownership of the materials and goods, then he has no right to be paid for them; but this is a personal interpretation. Nominated Suppliers' materials and goods are different since it is a condition of nomination that ownership shall pass . . . , clause 36.4.7 refers. The materials and goods referred to in this clause 30.2.1.2. is the value of the main contractor's, his domestic subcontractor's and nominated suppliers' materials and goods since these are to be for incorporation by the contractor; nominated subcontractors' materials and goods are again excluded.

(iii) 30.2.1.3. Offsite materials and goods which the architect, in the exercise of his discretion, may decide to include in the total value. This clause is deleted in the Scottish Supplement where they are made the subject of a Contract of Purchase. Where the architect decides to exercise his discretion Clause 30.3 applies.

(iv) 30.2.4. Total value of Nominated Subcontract work materials, etc. referred to in NSC/4 Clause 21.4.1. which are dealt with later in the article, but, note, *not* of those subcontractors who have been paid off, where Clause 30.2.3. applies.

(v) 30.2.1.5. Contractor's profit on the amounts referred to in Clause 30.2.1.4. ie. nominated subcontractors' work and materials, and those referred to in Clause 30.2.2.5. ie. subcontractors' direct loss and expense claims, and less the amounts referred to in Clause 30.2.3.2. ie. fluctuations payable by the subcontractor, plus 1/39th.

These amounts ie. 30.2.1.1. to 30.2.2.5. inclusive, are subject to retention (Clause

30.4. refers).

Clause 30.2. goes on to list items to be included in the interim certificate which are *not* subject to retention. These are covered in:

- (i) Clause 30.2.2.1—Clause 3 amounts which are listed as including

6.2—Fees and charges.

7. —Arising from inaccurate setting out, although it is difficult to imagine many circumstances that would warrant paying a contractor for costs arising out of inaccurate setting out and in most cases a 'deductive addition' would be made.

8.3.—Costs of inspections and tests. Still not a satisfactory clause to deal with the situation where parts only of an element are unsatisfactory but where opening up in a number of places to find the extent of the unsatisfactory work shows some parts to be in accordance with the contract.

9.2.—Payments for Royalties and Patent Rights arising out of an architect's instruction.

17.2.—Arising from Defects, Shrinkages, etc.—again, like Clause 7, would normally be a deduction from the contract sum, ie. where the employer accepts the defect, subject to the contract sum being reduced, rather than have the contractor return to the works, perhaps interfering with the employer's business activities.

17.3.—Arising from Interim Defects.

21.2.3.—Expenditure of provisional sum for insurance to cover loss or damage of the type covered by the old 19(2)(b) insurance clause.

(ii) Clause 30.2.2.2. Amounts of direct loss and expense ascertained under Clause 26.1. ie. caused by matters affecting regular progress of the works, and under Clause 34.1., caused by the finding of antiquities, etc.

(iii) Clause 30.2.2.3. Amounts of Final Payments made to nominated subcontractors under the provisions of Clause 35.17.

(iv) Clause 30.2.2.4. Fluctuations payable to the contractor under Clause 38 or 39.

(v) Clause 30.2.2.5. Amounts payable to nominated subcontractors under NSC/4 Clause 21.4.2. viz.

"Clause 3. amounts" ie. relating to statutory fees, etc. and to making good defects *not* at his own expense.

Clause 13.1 amounts ie. direct loss and expense to nominated subcontractor consequent upon the regular progress of the work being affected.

Clause 35 or 36 amounts of fluctuations payable to the nominated subcontractor *and* cash discount on these amounts. (The contractor's profit on these has already been given under Clause 30.2.1.5. above).

To these amounts are to be deducted (and which, of course, are not subject to retention):

- (i) 30.2.3.1.—'minus' fluctuations
- (ii) 30.2.3.2.—'minus' nominated subcontractors' fluctuation.
- (iii) 30.2. —Retention as applicable, Clause 30.4. setting out the rules for the ascertainment of this retention.

Examination of Clause 30.4. is, then, now necessary and it will be seen that the old method of calculating the full or gross retention and then adjusting that gross retention to allow for sectional completion, nominated subcontractors having been paid off in full, etc., has now been abolished and the new way is that full retention is deductible on certain sums, half retention on certain sums and, by implication, nil retention on certain sums. The relevant clauses are:

(i) 30.3.1.—where it may be noticed that the right to deduct retention is governed by the word 'may' ie. it need not be deducted at all.

(ii) 30.4.1.2. (i) the work which has not reached practical completion and

(ii) the value of materials and goods,

both (i) and (ii) being subject to full retention.

(iii) 30.4.1.3. refers to work which has reached practical completion but for which a certificate of Making Good Defects has not been issued. This is subject to half the retention percentage.

(iv) 30.5.2.1. provides that the architect, or, as will be the case in most contracts, the quantity surveyor, is to prepare a statement specifying the contractor's retention and the subcontractors' retention deducted in arriving at the amount stated as due in each interim certificate.

(v) 30.5.2.2. provides that at the date of each interim certificate the contractor and each subcontractor is to be issued such statement. This must surely mean that each subcontractor is issued with such a statement showing the retention relevant to that subcontract only.

Under Clause 35.13. the architect is to inform the contractor and each subcontractor of the amount of the payment to each of them which is included in the amount stated as due in the interim certificate. In practice the quantity surveyor will issue a statement which will show the Gross Valuation, the Amount subject to full retention, the Amount subject to half retention, the Amount subject to nil retention, the Nett valuation, the total amount previously stated as due, and the balance due, and on that statement show these amounts for the main contract and each subcontract. This information is readily available since the quantity surveyor will make up the interim valuation in this format in any case. Each nominated subcontractor would also get this information in respect of his own work.

Clause 30.7 obliges the architect to issue an interim certificate including the amounts

of subcontract sums finally adjusted. This certificate must be issued not less than 28 days before the date of issue of the main contract final certificate; such timing permits the employer to pay the nominated subcontractor direct under the provisions of Clause 35.13. if the contractor fails to pay the subcontractor. It should be noted that under Clause 35.17. the architect may, and on the expiry of 12 months from the date of practical completion of the subcontract works, shall issue an interim certificate which shall include the amount of the finally adjusted subcontract works.

2. Amount payable to the nominated subcontractor

The amounts payable by the contractor to the subcontractor are governed by Standard Form of Subcontract NSC/4 Clause 21. Note that the reference in NSC/4 Clause 21.2.1. to main contract clause 30.2.3.3. should read 30.2.3.2.

NSC/4 Clause 21.3.1.2. obliges the contractor to notify the subcontractor of the amount of the payment in respect of the subcontract which is due, and the contractor must fulfil his obligation to discharge (not necessarily pay) the payment, in full, less 2½% discount, within 7 days (calendar days not working days).

There are provisions, eg. NSC/4 Clause 12.2. whereby the subcontractor may be due to pay or allow the contractor monies or, under NSC/4 Clause 13.3, to allow the contractor to deduct from monies due to the subcontractor and where the contractor correctly offsets such sums due to him or deducts them from monies due to the subcontractor (and pays over any balance), then he has 'discharged' the payment. Upon such discharge or payment by the contractor, the subcontractor must supply the contractor with written proof of such discharge eg. issue a receipt, so that the contractor can provide the architect with the written proof referred to in Clause 35.13.3.

Note also that under NSC/4 Clause 21.3.1.2. where the employer has expended money in putting right some act, omission or default of the subcontractor, he, the employer, may deduct this from the main contractor's payment who will then have the right to deduct it from the subcontractor's payment.

NSC/4 Clause 21.4. sets out the rules for the ascertainment of the amounts due to the subcontractor's interim certificate and states that, subject to any agreement regarding stage payments, the amount is to be made up in accordance with NSC/4 Clause 21.4.1. and 21.4.2. less the total amount referred to in NSC/4 Clause 21.4.3.

NSC/4 Clause 21.4.1. sets out the amounts subject to retention viz. the total value of work properly executed, including variations and provisional sum work and with formula fluctuations included; and including materials and goods properly on or adjacent to the works; and including, where the architect so decides, the value of materials and goods not on the site. This provision is deleted in the Scottish version of the Subcontract Form.

NSC/4 Clause 21.4.2. sets out the

amounts *not* subject to retention ie.

(i) amounts of payments made or costs incurred by the subcontractor under main contract Clauses 6 or 7 (described above) and under NSC/4 Clause 14.4. (where the architect instructs that the liability to make good defects, shrinkages, etc. should not be entirely at the contractor's own cost, that benefit is to be passed on, where appropriate, to the subcontractor).

(ii) Amounts ascertained under NSC/4 Clause 13.1. as due to the subcontractor for direct loss and expense due to regular progress of the work being affected.

(iii) Amounts under NSC/4 Clause—fluctuations.

(iv) A 1/39th of the above amounts. This is to allow the contractor 2½% discount ie. so that the subcontractor receives the nett amount of these totals.

In the Scottish version of the Subcontract, provision is made in an additional Clause—NSC/4 Clause 21.4.4. for materials not on site to become the subject of a separate Contract of Sale. It is provided that this arrangement must not affect any cash discounts due to the contractor and so there would also be added to the subcontract payment a 1/39th of the amount of the payment made under the separate Contract of Purchase.

NSC/4 Clause 21.5. sets out the rules for the ascertainment of the retention to be deducted from the payment and refers to and incorporates the main contract Clauses 30.4. and 30.5.

FINAL PAYMENTS

1. Amount payable to the Contractor

There is in fact no provision for a final payment as such. There are clauses referring to the adjustment of the contract sum and to the issue of a final certificate which, taken together, would constitute a final payment.

Clause 30.6. might well be called the idiots' guide to the final account for it spells out the method of adjusting the contract sum in a manner that is so simple that the office boy could make it up!

Clause 30.6.2. starts off with the contract sum.

Clauses 30.6.2.1. to 30.6.2.5. list the amounts which are to be deducted from that contract sum.

Clauses 30.6.2.6. to 30.6.2.16. list the amounts which are to be added to that contract sum, and Clause 30.8. goes on to state that the final certificate shall state: 1. The sum of the amounts already stated as due in interim certificates and 2. The contract sum adjusted in accordance with Clause 30.6.2. and any difference between these two sums is to be paid by the employer to the contractor or vice versa as appropriate.

The Scottish version of the main contract has an additional Clause 30.11. which entitles the employer to add any liquidated and ascertained damages due to him to any amount which the contractor is due to the employer in the final certificate.

2. Amount payable to the subcontractor

The ascertainment of the final amount of the

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