Which Contract?

Choosing the appropriate building contract

Sixth edition

Sarah Lupton and
Manos Stellakis

RIBA

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Introduction to the book

The purpose of this book is to direct the reader to the standard forms of contract that may be appropriate for given situations. When the first edition was published in 1989, the range of standard forms available was more limited and contracts fell neatly into a few clearly defined procurement categories. Today, many more forms of contract are available, there are a variety of hybrids and variants to the conventional procurement routes and many forms can be used for a variety of procurement routes.

Rather than attempting to classify contracts purely by procurement route, this edition has organised the different forms by publisher. A range of filters have been applied to pull out the distinguishing features of each of the forms. These include, in addition to procurement route, the nature of the client, cost/pricing mechanisms, distribution of design responsibilities, provisions for subcontracting, programming and time arrangements, and integrative/collaborative features.

The results of these filters are presented in the form of tables, which are a key feature of this book. The tables will be a starting point for identifying which contracts are appropriate for a particular situation. The tables collate contracts that exhibit similar key characteristics, and break those characteristics down into detailed elements, so that readers wishing to prioritise particular features can make a shortlist of forms that may fit their needs.

Discussions of the individual contracts form the main body of the book. Each contract has a short summary at the head, which highlights the distinguishing characteristics of the form. There then follows an outline of the background, structure and intended use of the form. A synopsis of the form's terms is presented under key headings that reflect those used in the analytic tables. Each section ends with references and further reading.

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Professor Sarah Lupton MA DipArch LLM FCArb CArb RIBA is a partner in Lupton Stellakis and directs the Master of Design Administration and the Diploma in Professional Practice at the Welsh School of Architecture. She is dual qualified as an architect and as a lawyer. She lectures widely on subjects relating to construction law and is the author of many books including a series on JCT contracts, *Guide to the RIBA Domestic and Concise Building Contracts*, and *Cornes and Lupton's Design Liability in the Construction Industry*. Sarah contributes regularly to the *International Construction Law Review*, acts as an arbitrator, adjudicator and expert witness in construction disputes, is chair of the CIC's Liability Panel and the CIC Liability Champion and a past Chair of the RIBA President's Advisory Committee on Alternative Dispute Resolution. She is currently the external examiner for the MSc in Construction Law and Dispute Resolution at the British University in Dubai, and for the Architects' Professional Examination Authority in Scotland.

Manos Stellakis BSc DipArch MSc(Econ) RIBA, RIAS is a partner in Lupton Stellakis and has been an Expert Consultant/Distinguished Visiting Fellow at the Welsh School of Architecture since 1996. He is a visiting tutor at the University of Westminster, has been a visiting course coordinator and tutor at the Bartlett, University College London and lectures at a number of schools of architecture. Manos is an examiner at Westminster, the Bartlett and the Architectural Association. He has been a member of a number of Committees, including the RIBA Statutory Controls Committee, the RIBA Building Control Group and the Technical Review Group of the Construction Industry Research and Information Association. Manos is co-author of a number of books, including *Performance Specification: an analysis of trends and development of a conceptual framework*, *Performance Specification: a guide to its preparation and use*, *Through the Legislation Maze: Energy Conservation* and *Through the Legislation Maze: Health and Safety* and co-edited *Through the Legislation Maze* series. As a partner in Lupton Stellakis since 1984, he has completed numerous projects in the UK and other countries in Europe.

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Which Contract?

Part 1



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Introduction to contracts

1

The wide range of standard form contracts currently available in the UK is the result of a long history of invention, development and refinement, which began in 1870 when the first 'Heads of Conditions of Builders' Contract' appeared, published by the Royal Institute of British Architects (RIBA) with the London Builders' Society. Subsequently, the RIBA published its own Conditions of Contract in 1895, intended for traditional procurement, and for almost 50 years there was effectively only one standard form of building contract in use. This document has been revised, expanded and republished in numerous editions, its current manifestation being the 2016 edition of the Joint Contracts Tribunal (JCT) Standard Building Contract, available in three versions, depending on whether quantities are specified or not.

In 1945, the Institution of Civil Engineers (ICE) published a standard form, the first available for use on projects let on a measurement basis. The first edition of *Keating on Construction Contracts* made reference to both the ICE and the JCT Conditions of Contract and, together with the earlier *Hudson's Building and Civil Engineering Contracts*, provided authoritative legal commentary on the interpretation of these forms. The ICE has now withdrawn this form to lend its full support to the New Engineering Contract (NEC) forms that were first introduced in 1993.

During the decades following the Second World War there were extensive changes in the construction industry, resulting from an increased volume of construction, new construction technology and new methods of working. From the 1960s, alternative methods of procurement and standard forms began to appear. The JCT published the Prime Cost Contract in 1967 and the Agreement for Minor Building Works in 1968, followed by four new forms in the 1980s: the Standard Form 'with contractor's design' for design-build procurement; the Intermediate Form of Building Contract; the Standard Form of Management Contract; and the Measured Term Contract.

This increasing trend is reflected in the activity of other publishing organisations. Following the publication of its first edition of the Conditions of Contract in 1945, the ICE went on to publish a further three forms, including the NEC in 1993. The International Federation of Consulting Engineers (FIDIC) published its first form in the 1950s, the government published GC/Works/1 in 1973, and the Association of Consultant Architects (ACA) first published its form in 1982. The first edition of *Which Contract?* in 1989 covered around 15 forms of contract, whereas the current book covers 42 forms.

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1 Introduction to contracts

The Latham Report[1] in 1994, which presented an extensive review of the state of the UK construction industry at that time, has had a considerable effect on contract forms and procedures. It recommended better project strategy, more integrated ways of working, fairer tendering processes, improved payment procedures and the rapid resolution of disputes by adjudication. It stressed the role of the client as the driving force behind each project. The report also recognised the importance of a full brief, the commitment to consider design quality alongside the lowest price in determining best value, fair dealing for all parties in an atmosphere of mutual cooperation and the outlawing of unfair conditions. It laid the foundations for a new way of thinking about procurement, the place of partnering and the benefits of long-term relationships.

In 1998, the Egan Report[2] built on many of the points raised by the Latham Report, and emphasised the necessity for greater efficiency. In particular, it stressed the need for improvements in construction cost monitoring and time control, greater predictability concerning delivery and a reduction in the number of building defects. It called for the elimination of wastage through 'lean thinking' and a reduction in the number of site accidents. The idea of targets, performance measurement indicators and benchmarking as aids to achieving planned and consistent improvement reflected a changing climate of opinion on procurement.

These two reports, together with Part II of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA), which followed as a direct result of the Latham Report, have had a significant effect on procurement methods and the text of current contract forms. In 2009, after a series of industry consultations, the Local Democracy, Economic Development and Construction Act 2009 (LDEDCA) was passed to amend the HGCRA. Part 8 of the LDEDCA, on construction contracts, did not come into force until autumn 2011.

The 1990s and early 2000s represented an important period in the development of construction contracts in the industry. The JCT became a distinct legal entity, its focus continuing to be on the consolidation and improvement of its suite of contracts. The period 1998 to 2005 saw the JCT publish various updates of the JCT suite and new contracts, such as the Home Owner/Occupier forms (which are analysed later in this book), were added to the suite.

Other institutions were also active and, continuing the theme of integrating the team and collaboration raised by the Latham Report and the subsequent enactment of the HGCRA, the ICE published the third edition of its NEC suite of documents and started the process of expanding the range of contracts on offer with this suite, including a secondary option, X12 Partnering, for collaboration. The ACA published its multi-party Standard Form of Contract for Project Partnering, PPC2000, and

1 Sir Michael Latham, *Constructing the Team* (London: HMSO, 1994).
2 Sir John Egan, *Rethinking Construction: Report of the Construction Task Force* (London: HMSO, 1998).

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subsequently its short form SPC2000 and term partnering contract TPC2005. Around the same time, the JCT collaborated with the Reading Construction Forum to produce the Be Collaborative Contract, later replaced with its own multi-party contract – the JCT Constructing Excellence Contract (CE).

The government, in its construction strategy 2016–2020, has continued to follow the procurement policy put forward in its earlier strategy documents, such as *Construction 2025*,[3] in which it favours three methods of procurement: two stage open book, cost-led procurement and integrated project insurance. It supports early contractor involvement and the use of integrated teams, endorses fair payment provisions and promotes the use of building information modelling (BIM) on all government projects. These initiatives have had a major impact on public procurement, and contract-drafting bodies have designed innovative new forms or revised existing ones to reflect these requirements. The Public Contracts Regulations (2006 and 2015) have also had a significant impact on public procurement, placing restrictions on the methods of tendering that can be used and leading to an increase in the use of framework arrangements.

Currently, the latest versions of the majority of two-party standard form contracts include terms that support collaborative working. The number of forms available that include multi-party arrangements, and/or are intended to cover a series of projects, has also increased. In many cases these include pain/gain mechanisms, whereby all members of the team agree to share the financial benefits and risks; examples can be seen in the JCT CE Project Team Agreement, the ACA Framework Alliance Contract 1 (FAC-1) and the NEC4 Alliance Contract (published in 2018).

As well as these contracts for large projects, since the last edition of this book, several new contracts have been published for simpler projects, including two by the RIBA in 2014 (now in their second edition).

There are currently over 50 standard forms of building contract published for use in the UK, emanating from nine publishing sources. The JCT now publishes 17 forms of main contract, including variants and the two framework agreements, plus numerous subcontracts, warranties and guides, all of which have been updated in the JCT 2016 suite. The ICE's NEC4 suite comprises 60 documents and includes nine main contracts. The Association for Consultancy and Engineering (ACE) and the Civil Engineering Contractors Association (CECA) publish the Infrastructure Conditions of Contract (ICC) and the ACA publishes five key forms, including PPC2000 and the FAC-1. The evolution of the current range of forms is detailed in Figure 1.1, together with a chronology of the events that prompted and influenced their development.

3 HM Government, *Construction 2025: Industrial strategy for construction – government and industry in partnership* (London: Department for Business, Innovation and Skills, 2013).

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Figure 1.1: Chronology of development of standard forms

Contract published	Date	Influential events
	1818	Institution of Civil Engineers (ICE) founded
	1834	Royal Institute of British Architects (RIBA) established. Originally formed as the Institute of British Architects in London, the current name was adopted in 1892
	1834	Chartered Institute of Building (CIOB) founded. Originally formed as the Builders Society, becoming the London Master Builders Society in 1867, the Institute of Builders in 1884, the Institute of Building in 1965 and the Chartered Institute of Building in 1980
Heads of Conditions of Builders' Contract RIBA with the London Builders' Society	1870	
	1891	*Hudson's Building and Civil Engineering Contracts*, first edition
RIBA Conditions of Contract	1895	
RIBA Conditions of Contract Alternatives for contracts with and without quantities included	1902	
RIBA Conditions of Contract	1909	
	1913	International Federation of Consulting Engineers (FIDIC) founded
JCT Conditions of Contract	1931	Joint Contracts Tribunal (JCT) established by the RIBA and the National Federation of Building Trades Employers (NFBTE)
JCT Conditions of Contract	1939	
General conditions of government contracts for building and civil engineering works: form of contract – CCC/Works/1	1942	
ICE Conditions of Contract	1945	
CCC/Works/1, fifth edition	1955	*Keating on Building Contracts*, first edition
FIDIC Red Book – contract aimed at civil engineering sector	1957	

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Contract published	Date	Influential events
JCT Standard Form of Building Contract 1963 edition Two versions, private and local authority, each with alternative editions for use with or without bills of quantities	1963	
	1964	Scottish Building Contract Committee Limited (SBCC) established
JCT Prime Cost Contract	1967	
FIDIC Yellow Book – contract aimed at mechanical and engineering (M&E) sector	1967	
JCT Agreement for Minor Building Works	1968	
Form of Contract for Use Where the Contractor is to Design and Build, NFBTE	1970	
Government Conditions of Contract, GC/Works/1 (replacing CCC/Works/1 form) Aimed at public and private sector projects	1973	Association of Consultant Architects (ACA) established
	1973	Joint Council for Landscape Industries (JCLI) established. In 2004 it became the Joint Committee for Landscape Industries and in 2010 the JCLI Contracts Forum with the mandate to continue to develop the JCLI contracts
Form of Contract for Use Where the Contractor is to Design and Build, NFBTE, revision	1974	
JCT Standard Form of Building Contract 1980 edition Six variants – private and local authority forms, each in with, without and with approximate quantities versions	1980	
ICE Design and Build Contract	1980	
JCT Intermediate Form of Building Contract	1981	
JCT Standard Form of Contract with Contractor's Design (first JCT design-build contract)	1981	
Contractor's Designed Portion Supplement, by JCT	1981	
ACA Form of Building Agreement	1982	
JCT Standard Form of Management Contract	1984	

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Contract published	Date	Influential events
ACA Form of Building Agreement, second edition	1984	
	1985	National Economic Development Office (NEDO) *Thinking about Building* report. Chart of nine procurement selection criteria, including aspects relating to quality, time and cost
CIOB Design and Build Contract	1988	Construction Industry Council (CIC) founded as a pan-industry forum representing all aspects of the built environment
JCT Measured Term Contract	1989	*Which Contract?* first edition
GC/Works/2 Contract for Building and Civil Engineering Minor Works	1990	Lupton and Stellakis, *Performance Specification: A guide to its preparation and use*, RIBA Publications (based on the report to the JCT)
	1991	Reading Construction Forum established
ICE Design and Construct Conditions of Contract (Government decision to use design-build for road schemes)	1992	Private Finance Initiative (PFI) introduced, with the emphasis on reducing the public sector borrowing requirement
Amendment 12 to the JCT Standard Form of Building Contract, express provisions for Performance Specified Work	1993	
New Engineering Contract (NEC) first edition	1993	
	1994	*Constructing the Team*, Sir Michael Latham (Latham Report)
NEC Engineering and Construction Contract, second edition	1995	*Trusting the Team: The best practice guide to partnering*, Reading Construction Forum
FIDIC Orange Book – Design and Build contract	1995	Construction Industry Board (CIB) set up by the government. Mainly concerned with the implementation of the recommendations in the Latham Report and the Egan Report. Ceased to exist in June 2001. Its initiatives are now mostly run by the government through the CIC
	1996	National Joint Consultative Committee (NJCC) for Building, Code of procedure for single stage selective tendering

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Contract published	Date	Influential events
	1996	Housing Grants, Construction and Regeneration Act
	1997	*Partnering in the Team: A report by Working Group 12 of the CIB*
	1997	Election of Tony Blair. PFI emphasis shifted to 'value for money'
	1997	Lean Construction Institute formed
	1998	*The Seven Pillars of Partnering*, Reading Construction Forum
JCT standard forms revised to comply with the HGCRA and the Latham Report recommendations	1998	JCT Ltd formed
CIOB Mini Form of Contract	1998	*Rethinking Construction* – government sponsored review of industry, chaired by Sir John Egan, identified five drivers for change and four process improvements, one of which was partnering the supply chain
ACA Form of Building Agreement, third edition	1998	Movement for Innovation (M4i) established to oversee implementation of the Rethinking Construction recommendations
	1998	Construction Best Practice Programme (CBPP) – working alongside M4i, CBPP disseminates the innovations and lessons learned from demonstration projects
JCT Building Contract for a Home Owner/ Occupier	1999	*Achieving Excellence* launched. Government response to the Egan Report, focused on enhancing the image of the public sector as a client and on improving the efficiency of the construction industry
FIDIC Silver Book – contract for turnkey projects	1999	*A Guide to Project Team Partnering* by the CIC, contained suggested heads of terms for a partnering contract (second edition in 2002)
	1999	Model Project Pact, CIB
	1999	*Building Down Barriers: Prime contractor handbook of supply chain management* recommending long-term strategic supply chain alliances

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Contract published	Date	Influential events
	1999	M4i publishes Key Performance Indicators (KPI), revised April 2000; comprised 11 KPIs
NHS ProCure21 Introduced a partnering framework for the Department of Health and the National Health Service (NHS)	2000	Department of Health published *Sold on Health*, which set out a range of initiatives to improve the NHS's planning, procurement and operation of its estate
PPC2000 New partnering contract published by the ACA, developed by the CIC partnering task force	2000	Confederation of Construction Clients (CCC), formerly the Construction Clients' Forum, aims to encourage clients 'to achieve value for money through best practice'
GC/Works amendment Supplemental clauses: risk assignment, value engineering	2000	*Architects and the Changing Construction Industry* published by RIBA
ACA SPC200, Standard Form of Specialist Contract	2000	
	2001	JCT Practice Note 4 (second series): Partnering
	2001	Strategic Forum – replaces CIB
JCT Building Contract for a Home Owner/Occupier with consultant's agreement	2002	Accelerating Change – Strategic Forum. Set out measurable targets for improving performance in construction, including client involvement, integrating the team and 'people issues'
JCT Contract for Home Repairs and Maintenance	2002	
JCT Construction Management documents	2002	
JCT Major Projects Form	2003	Be (Collaborating for the Built Environment) formed. Reading Construction Forum merges with the Design Build Foundation
CIC Collateral Warranties published	2003	
ACA Form of Building Agreement, revised third edition	2003	

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Contract published	Date	Influential events
CIC Novation (Consultant Switch) Agreement published	2004	Constructing Excellence created – including: Reading Construction Forum, Design Build Foundation, Construction Best Practice Programme, M4i, the Housing Forum, Rethinking Construction, Be, Local Government (Construction) Task Force (LGTF)
Perform 21 Public Sector Partnering Contract	2004	
CIOB Mini Form of Contract (General Use) CIOB Mini Form of Contract for Home Improvement Agencies	2004	
ACA TPC2005 Standard Form of Contract for Term Partnering	2004	
NEC3 contract suite	2005	Office of Government Commerce (OGC) recommends the use of NEC3 by public sector construction procurers on their construction projects
JCT standard forms Complete new suite published	2005	
JCT Framework Agreements	2005	
FIDIC Pink Book – contract for multilateral development banks	2005	
	2006	New KPIs launched by Constructing Excellence
JCT Constructing Excellence Contract	2007	
FIDIC Gold Book – Design Build Operate contract	2008	
	2009	Local Democracy, Economic Development and Construction Act
Infrastructure Conditions of Contract (ICC) published by the ACE and CECA, based on the ICE Conditions of Contract	2011	Government Construction Strategy published, which indicates a push towards a paradigm change with proposals for the introduction of building information modelling (BIM) and new methods of procurement
JCT standard forms – new suite of forms	2011	LDEDCA becomes effective in England, Wales and Scotland, amending Part II of the HGCRA
Amendments to NEC3 suite of contracts	2011	

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Contract published	Date	Influential events
CIOB Mini Form of Contract (General Use) CIOB Mini Form of Contract for Home Improvement Agencies (revised editions of CIOB Mini Form of Contract)	2011	
CIOB Complex Projects Contract	2013	
Further updates and additions to NEC3 suite of contracts	2013	
CIC BIM Protocol	2013	
RIBA Concise and Domestic Building Contracts	2014	
CIOB Time and Cost Management Contract (revised edition of CIOB Complex Projects Contract)	2015	
NHS ProCure22	2016	Government Construction Strategy 2016–20
JCT standard forms – new suite of forms	2016–17	
FIDIC Rainbow Suite of Contracts (second edition)	2017	
NEC4 contracts, including new Design Build Operate Contract	2017	
NEC4 Alliancing Contract	2018	
RIBA Concise and Domestic Building Contracts (second edition)	2018	
CIC BIM Protocol (second edition)	2018	
CIC Collateral Warranties and Novation Agreements (second edition) (first edition of Novation Agreement – Ab Initio)	2018	
ICC Design and Construct Version (2018 edition)	2018	

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Thinking about procurement 2

Introduction to procurement

A procurement system has been defined as 'the organisational structure adopted by a client for the implementation, and at times the eventual operation, of a project'.[1] This organisational structure is normally underpinned by one or more legal contracts, and this book focuses on the central contracts between the client (the demand side) and the contractor (the supply side).

The party with whom the client contracts will often enter into further contracts, so that 'chains' of contracts develop; for example, client – service provider – main contractor – specialist – subcontractor – sub-subcontractor – supplier. The term 'supply chain' has been coined to describe these arrangements. In reality, the pattern is often more accurately described as a network, as the chain is often 'short-circuited' by further contracts that link parties that are not directly connected. For example, in a client – main contractor – subcontractor chain, the client may enter into a contract direct with the subcontractor, often termed a 'collateral warranty'. The key reason for such a step is to ensure that the client would have a right of action against the subcontractor in the event that the main contractor becomes insolvent.

Multilateral contracts can be used in place of, or alongside, these networks of bilateral contracts. Generally, their purpose is to create a legal relationship between all the members of the project team, committing them to shared objectives and methods of working, with or without a financial benefit to the parties.

Although an infinite variety of arrangements is possible, it is convenient to classify those that share key defining characteristics under broad benchmark headings. It is generally accepted that there are four key methods of procurement that are currently practised[2]:

1. **Design-bid-build**, often referred to in the UK as the 'traditional' or 'general contracting' approach, in which design is carried out by client-appointed consultants who are members of the design team. Following a tender process, the chosen contractor, who has no design input, is responsible for constructing the project in accordance with the design.
2. **Design-build**, where a contractor carries out partial or full design and constructs in accordance with that design.

1 Masterman, J.W.E., *Introduction to Building Procurement Systems*, 2nd edition (London: Spon Press, 2002).
2 See, eg, Hughes, W., Champion, R. and Murdoch, J., *Construction Contracts: Law and management*, 5th edition (Oxford: Routledge, 2015).

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3. **Management**, under which either the client or a contractor assumes the central management responsibility and the work is divided into packages and tendered sequentially as works or trade contracts to firms selected by the client (the individual contracts may follow either of the two approaches outlined above).
4. **Collaborative**, or **integrated**, where the client and other team members, including consultants, and one or more contractors and/or specialist contractors agree to work collaboratively to achieve defined objectives and may also share risks/losses and rewards.

There are, of course, many variants within each category. There are also hybrids and compounds of these key methods, where elements of two or more methods are used in conjunction to procure a project. An example of the former would be a design-bid-build procurement where much of the design information is provided after, not before, the main contract is let (such as under a prime cost contract). An example of a compound of key methods might be where a design-build contract is coupled with a project team agreement in which the parties agree to work cooperatively, but which includes no cross-team liability and no shared financial rewards. The four key procurement methods are outlined below, together with some of the most commonly used variants.

Design-bid-build

Key characteristics

The terms 'design-bid-build' or 'traditional' are used to refer to a system in which the building design is provided by the demand side, and the role of the supply side is to carry out and complete the work (it is also sometimes referred to as 'conventional' or 'general' contracting). The supply side's responsibility extends to all workmanship and materials, including work by subcontractors and suppliers.

The design can be prepared by the client in-house (as might be the case for a sizeable developer or a local authority with a design department), but is more usually prepared by a team of consultants commissioned separately by the client. Usually the client also appoints an independent administrator, who has a defined role under the contract. Design-bid-build procurement has been in use since the nineteenth century, which would explain why it is often referred to as 'traditional', and the earliest standard forms followed this model.

Design-bid-build: tendering

The contractor is usually chosen after competitive tendering at around RIBA Plan of Work Stage 4,[3] using documents that provide complete information about the works which the contractor is to carry out. Sometimes a single contractor is approached at an earlier stage, and the tendering is on a negotiated basis but the

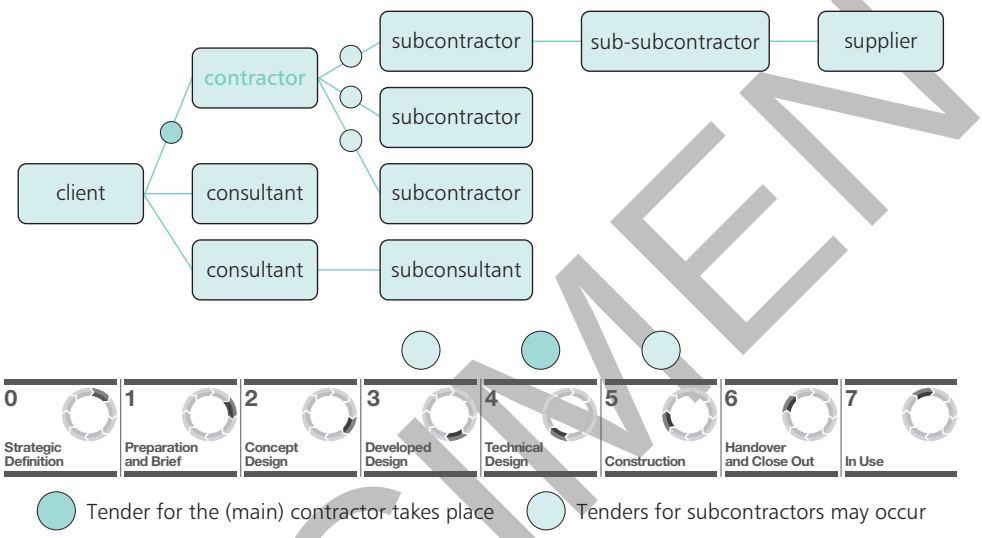
3 RIBA, RIBA Plan of Work 2013.

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Figure 2.1: Design-bid-build procurement – contractual relationships, tendering and RIBA Plan of Work 2013 stages



contractor is not appointed until the tender package is finalised and the contract sum agreed.[4]

Design-bid-build: contractual relationships

In the design-bid-build approach, the client enters into direct contractual relationships with the designer and other consultants on the one hand and the contractor on the other (Figure 2.1). Any contractual links for subcontracts or supply contracts will be between the contractor and the firms in question. Design-bid-build contracts usually provide for a consultant, who is appointed by the client, to administer the contract. This consultant has no contractual link with the contractor.

Under the JCT suite, such consultant is named in the building contract as the 'Architect/Contract Administrator'. The contract administrator acts as an 'impartial decision maker' and, while this is not stated in the contract, the duty has been long established through case law.[5] Under the NEC4 suite, this role is taken up by the 'Project Manager'. Even though the NEC4's project manager represents the client, the courts have clarified that there is nothing in the contract that would cause the project manager not to 'act impartially in matters of assessment and certification'.[6] In other contracts, the distinction of the different functions is made explicit in the

4 For further information on tendering processes, see JCT Tendering Practice Note 2017 or RICS Guidance Note: *Tendering Strategies* (2014).
5 *Sutcliffe* v *Thackrah* [1974] AC 727.
6 *Costain Ltd* v *Bechtel Ltd* [2005] EWHC 1018, Mr Justice Jackson, paragraph 46.

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contract. For example, under the FIDIC suite, the 'Engineer' is generally deemed to be acting for the employer (clause 3.2), except that when determining a claim the engineer is required to 'act neutrally between the Parties and shall not be deemed to act for the Employer' (clause 3.7).

Design-bid-build: variants and hybrids

Design-bid-build 'with contractor's design'

A very common variant of the design-bid-build procurement model is where an essentially traditional contract includes provision for the contractor to design a defined part or parts of the project. The client will retain responsibility for providing the rest of the design and for integrating the contractor's designed portion with the project as a whole. The JCT publishes versions of the Minor Works and Intermediate Contracts with contractor's designed portions included, and all three versions of its Standard Building Contract include this provision. The FIDIC Red Book also includes a contractor's design provision. Although it is possible to identify a large number of parts to be designed by the contractor, this can cause problems with integration and the interfaces between the parts and the project as a whole. The selected parts should therefore be kept to a limited number of discrete items.

Design-bid-build with client-selected subcontractors

Although in this procurement method the contractor will normally select and manage its own supply chain, on certain projects the client will wish to select some of the subcontractors to be engaged by the contractor (variously referred to as named, nominated or pre-selected). In such cases, depending on the form of contract used, the contractor may take full responsibility for their performance, or the contractor's responsibility may be limited in some way – for example, the contractor may have no liability for design undertaken by the client's selected firm. Where the client selects any subcontractors or suppliers, it may be advisable to recommend the use of collateral warranties to protect the client's interests, particularly in respect of matters which lie outside the contractor's responsibilities.

Accelerated traditional method

As noted above, the contract is normally tendered after all design information has been prepared. However, the contractor can be appointed earlier, on the basis of partial or notional information. This is sometimes referred to as the 'accelerated traditional method'. Under this variant, design and construction can run in parallel to a limited extent. While this method allows an early start on site, it also provides less certainty about cost. It should not be confused with design-build or other forms of procurement, as it still retains the essential defining characteristics of traditional procurement: a single contract with a main contractor, with the client's consultants providing all or the majority of the design. The difference with this accelerated method is that the information will be provided after the contract is let. One standard form contract that can work on this basis is the JCT Prime Cost Contract.

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Design-build

Key characteristics

In contrast to design-bid-build, where the design is supplied by the client side, by the 1960s an alternative method of procurement had emerged, sometimes referred to by authors at that time as the 'package deal' approach:

> In these contracts the essential feature is that the employer does not employ professional staff to produce the design of the building. Either by negotiation, or by outline specification to tendering contractors, the employer makes known his requirements and the contractor produces the design in the form of drawings, a specification, and sometimes schedules of rates.[7]

This method was most frequently adopted for simple projects, and/or where the design used limited and standardised technology, such as industrial systems building. The contractor undertook the design in house.

Modern design-build procurement is a development of the 'package deal' approach, used for a wider range of building types (the first standard form for design-build was published by the JCT in 1981). It retains the essential characteristic of the contractor taking responsibility for providing both the design and construction under a single lump sum contract. In principle this method allows the client to hold a single party responsible for the full package of design and construction (ie providing a 'one-stop shop') for an agreed price, and for construction work to start at an earlier stage than it would under the traditional procurement method (as the design can be finalised in parallel with ongoing construction).

The degree of design input required from the contractor will vary depending on the stage of development at which the contract is tendered; the arrangement may be for total design and construction based on a client's brief, or for design development and production information based on an outline design supplied by the client's consultants. The design-build contract is often tendered on a detailed set of information about the project requirements, embodying a large number of design decisions that have already been taken. The contractor's role is then limited to completing detailed aspects of the design.

A key issue in design-build procurement is the extent to which the design-build contractor's responsibility is limited to its own design input (the approach taken by most standard forms), or whether it takes responsibility for the whole design, including any design information supplied to it at tender stage. A related issue is the priority assigned to the employer's requirements and the contractor's proposals submitted at tender stage, should these later be found to conflict. These issues are discussed in Chapter 3 and the commentary on the individual standard forms.

7 Duncan Wallace, I. (ed.), *Hudson's Building and Engineering Contracts*, 10th edition (London: Sweet & Maxwell, 1970), p. 207.

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Design-build procurement: tendering

The contractor may be appointed either by competitive tender or as the result of a negotiated agreement. A design-build contract can be tendered competitively in a single-stage tender process, often referred to as 'single stage design and build'. This would usually be undertaken at RIBA Plan of Work Stage 1 or 2. Where a design-build agreement is negotiated with just one contractor, it is sometimes referred to as 'single direct design and build'.

Sometimes a two-stage tender process is adopted, usually referred to as 'two stage design and build'. In this case an approach is made at a very early stage to a number of contractors, with only the most promising proceeding to the second stage. The initial selection will generally be made on the basis of the contractor's track record, its management expertise, its proposed profit and overheads and, possibly, on its rates for limited types of work, particularly early stage work. The contractor's response to the client's cost plan and any outline design may also be taken into account. The selected contractor then works with the client's consultants to develop the second stage package, at which point the design-build contract will be tendered, either by negotiation or by competitive tender. During the first stage, it is important that the contractor is appointed on a formal contract, by means of a pre-construction services agreement (such as JCT PCSA16). It is also possible to appoint specialist firms at this stage, who may ultimately be engaged as subcontractors (this could be done on PCSA/SP16).

Design-build procurement: contractual relationships

With most design-build arrangements, the main contractual link is between the client and the contractor (Figure 2.2). Whether or not there is a role for an independent administrator will depend on the specific contract form used; the JCT Design and Build Contract (JCT DB16) does not include this role, whereas the NEC4 and other contracts provide for the appointment of a project manager (see Table 2.1, which sets out the basis and scope of the administrator's independence).

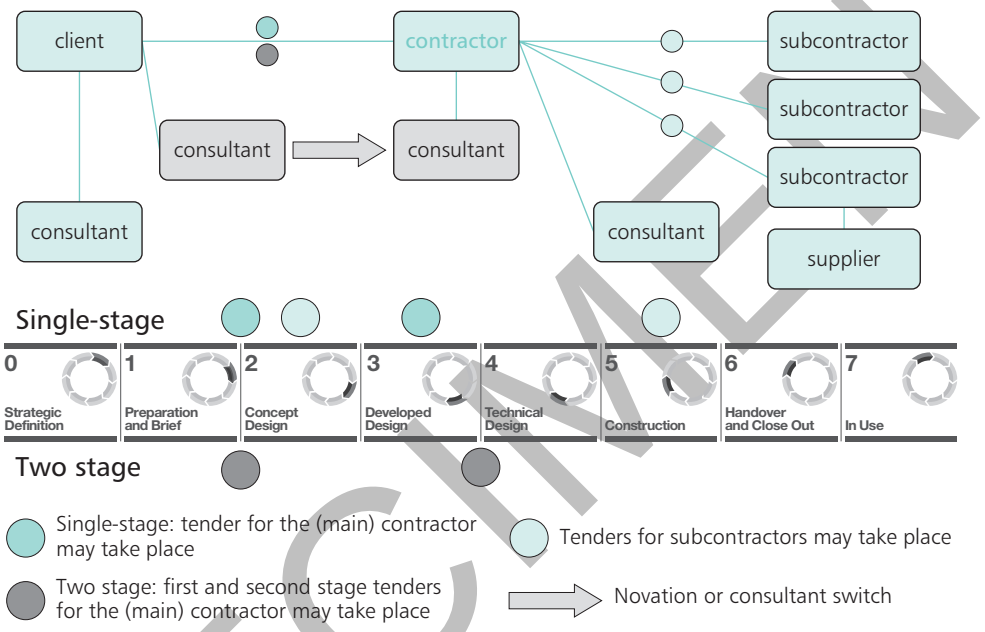
It is likely that, in the absence of in-house professional staff, the client will wish to engage outside consultants to advise on the preparation of requirements and to evaluate and select tenders, etc. The contractor might also have a contractual link with its own design consultants, and with subcontractors and suppliers. Although the contractor is wholly responsible for the performance of these parties, in terms of both design and construction, the client may nevertheless wish to arrange for collateral agreements with them.

Frequently, in design-build procurement the client will require the contractor to take on some or all of its consultants at the time of entering into the design-build contract. This process is usually referred to as 'novation' or 'consultant switch'. It requires a complex tripartite agreement between client, consultant and contractor.

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Figure 2.2: Design-build procurement – contractual relationships, tendering and RIBA Plan of Work 2013 stages



The CIC publishes suitable forms for novation or consultant switch and the related collateral warranties which can be used alongside the consultant's own terms of appointment.[8] The client may also wish to require the contractor to use particular subcontractors; whether this is feasible will depend on the particular contract selected (the JCT DB16, for example, allows for 'named sub-contractors').

Design-build procurement: variants and hybrids

Cost-led procurement

The term 'cost-led procurement' is used by the government for one of the three methods it favours and is trialling on its own projects (the others are 'two stage open book' and 'integrated project insurance', see below[9]). This method is normally based on a pre-existing framework agreement, although it could be used without this. The client selects two or three 'integrated supply chain teams' from the

8 The CIC's Novation Agreement – Ab Initio (2018) and Novation Agreement – Switch (2019) are available from cic.org.uk/publications.

9 See *Government Construction Strategy: Final Report to Government by the Procurement/Lean Client Task Group*, July 2012; Cabinet Office, *New models of Construction Procurement* (London: HMSO, 2014); Infrastructure and Projects Authority, *Common Minimum Standards for Construction: Common minimum standards for the procurement of built environments in the public sector*, March 2017.

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Table 2.1: Provisions for independent administrator role in design-build contracts

Contract	Provision	Control: time
JCT DB16	No provision	N/A
JCT MP16	No provision	N/A
JCT CE16	No provision	N/A
NEC4 ECC	Project manager	Project manager
FIDIC Yellow Book	Engineer	Engineer
FIDIC Silver Book	Employer's representative	Employer (or assigned to employer's representative)
ICC D&C 2018	Engineer	Engineer
CIOB TCM15	Contract administrator, cost manager, time manager, listed persons	Contract administrator, time manager
CIOB Mini Form of Contract (General Use) 2014	Contract administrator	Contract administrator
GC/Works/1	Project manager	Project manager

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Control: quality	Control: cost	Basis and scope of administrator's independence
N/A	N/A	N/A
N/A	N/A	N/A
N/A	N/A	N/A
Project manager and supervisor	Project manager	Project manager represents the client. However, there is nothing in the contract that would cause the project manager not to 'act impartially in matters of assessment and certification' (*Costain Ltd* v *Bechtel Ltd* [2005] EWHC 1018)
Engineer	Engineer	The engineer is generally deemed to be acting for the employer (3.2), except that when determining a claim it is required to 'act neutrally between the Parties and shall not be deemed to act for the Employer' (3.7)
Employer (or assigned to employer's representative)	Employer (or assigned to employer's representative)	The employer's representative is generally deemed to be acting for the employer (3.1), except that when carrying out the duties under clause 3.5 (agreement or determination) it 'shall not be deemed to act for the Employer' (3.5)
Engineer	Engineer	The engineer shall act impartially where required by the contract to decide any matter as between the parties to the contract (5.4)
Contract administrator	Contract administrator, cost manager	Where the contract administrator, time manager, cost manager and/or any listed person is required to exercise discretion as between the interests of the employer and contractor, it shall do so independently and fairly (4.2)
Contract administrator	Contract administrator	Contract administrator acts as an 'impartial decision maker'. Derivation from case law (*Sutcliffe* v *Thackrah* [1974] AC 727)
Project manager	Project manager	Project manager's role similar to JCT's contract administrator. Acts as an 'impartial decision maker'. Derivation from case law (*Sutcliffe* v *Thackrah* [1974] AC 727)

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framework, which would be contractor-led and include designers and subcontractors). These teams are invited to bid competitively for the project and

> Provided at least one of the supply teams can beat the cost ceiling, it will be selected on the relative scored attractiveness of its commercial and physical proposition and of its team members before being awarded the contract to deliver the project.[10]

The team is therefore selected on the basis of price and the merits of its design proposals. Essentially, 'cost-led procurement' is a government design-build method in which the bidding teams have undergone a pre-selection process based on criteria such as experience, skills, etc.

The government favours single point responsibility, where the separate contracts that are required for the traditional route are packaged under one overarching contract, as they are with design-build arrangements. This enables a hands-off approach once that main contract is let.

Two stage open book

The term 'two stage open book' is used by the government to denote another of its preferred procurement routes. Under this system, the client invites prospective team members, usually selected from firms that are already part of a framework agreement or alliance, to bid for a project on the basis of an outline brief and cost benchmark. The bidders (usually limited to two or three) are chosen based on their capacity, capability, stability, experience and the strength of their supply chain, plus their profit/fees/overheads and their other costed proposals, as appropriate. The winning team (comprising the main contractor and consultants) is then appointed to develop a set of design and other proposals on the basis of 'open book costs' that meet the client's stated requirements and cost parameters, obtaining tenders from suppliers and subcontractors in relation to specific work/supply packages and appointing successful firms, thereby developing an 'integrated team'.[11] The client will authorise start on site when the integrated team has built up designs in accordance with the project brief and finalised a fixed price or target cost that meets the client's budget. This system requires two stages of contractual arrangement: the initial pre-construction appointments (sometimes referred to as 'conditional', since at that point it is not certain that the project will proceed) and the on-site contracts. The ACA's PPC2000 is an example of a standard form that embodies this two-stage approach in one document.

Turnkey

The term 'turnkey' is often used where the contractor designs and builds the project, usually for a fixed price, and the project is fully equipped, commissioned and handed

10 Cabinet Office, *New models of Construction Procurement* (London: HMSO, 2014), p 8; Cabinet Office, *Cost-led Procurement Guidance: Guidance for the procurement and management of capital projects* (London: HMSO, 2014), p. 7.

11 King's College London, *Project Procurement and Delivery Guidance: Using two stage open book and supply chain collaboration* (London: HMSO, 2014).

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over ready to operate. This system can also be termed 'engineering, procurement and construction' (EPC). In a turnkey arrangement, the owner provides a brief that describes the required outputs, including detailed performance specifications for the completed facility. The difference between the turnkey approach and normal design-build is in the state of readiness; in the latter, the facility is handed over in a fully operational state. Also, the contractor often accepts a higher degree of risk, namely liability for the full design, including for any design and other information issued to it at tender stage. In some cases, the contractor also provides financing and/or land procurement services. Turnkey arrangements are typically used in large international engineering, power or process plant construction projects, and the FIDIC Silver Book is an example of a form drafted to cater for this method of procurement.

DBO, BOT, BOOT

A further variant of design-build procurement involves the contractor not only designing and constructing, but also operating the facility for an agreed period of time, termed 'design-build-operate' (DBO). Usually such arrangements are coupled with the contractor providing some or all of the finance, such as the 'build-operate-transfer' (BOT) or 'build-own-operate-transfer' (BOOT) routes, where the supplier will finance, design, build, operate, manage and maintain the facility, and then transfer it to the client (normally a government department) following a concession period when the costs are recovered through, for example, levying a toll. As with turnkey contracting, these routes are often used for utility projects, and also for transport and infrastructure projects, such as major bridges and tunnels. An example of a standard form applicable to this situation is the NEC4 Design Build and Operate Contract.

PFI

In the UK, the Private Finance Initiative (PFI) is a particularly significant variant of these systems. Introduced by the Conservative government in 1992, it is a means of transferring the risks associated with public service projects to the private sector in part or in full.[12] The purpose of the PFI is to deliver all kinds of projects to the public sector, including the construction of buildings and the provision of associated operational services. PFI is a form of public–private partnership (PPP) in which a public infrastructure project is initially funded with private capital.

Private consortia, usually involving large construction firms, are contracted to design, build and, in some cases, manage new projects. The public sector authority first signs a contract with a private sector 'operator'. Frequently, the operator is a private sector consortium which forms a distinct company called a 'special purpose vehicle' (SPV). The SPV takes on the obligation for maintenance and, possibly, operation as well as design and construction of the facility. The consortium is usually made up of a building contractor, a maintenance company and a lending bank.

12 House of Commons, *The Private Finance Initiative (PFI)*. Research Paper 01/117 (London: House of Commons, 2001).

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As well as signing a contract with the government, the SPV will enter into contracts with other companies to design and/or build the facility and then maintain it. The PFI contract will typically last for 30 years, during which time the building is leased by a public authority.

In PFI, the overall project costs are recouped from the public body during the project's operational period. In other types of PPP, the cost will be recouped from the users. If the operator fails to meet any of the agreed standards it will normally lose an element of its payment until standards improve. If standards do not improve after an agreed period, the public sector authority is entitled to terminate the contract.

The total project costs in PFI are frequently above the price for which the public sector could have provided the service. At the time of writing, the government as announced that there will be no further PFI contracts, but that it will honour its existing commitments.

Management

Key characteristics

Management procurement, as the term is currently understood, began to appear around the 1980s. The aim was to develop a system whereby work could start before the design was complete, thereby achieving the benefits of design-build procurement in terms of speed while allowing design control to be largely retained by the client (as with traditional procurement). Under the management system, the contractor is appointed on a fee basis for managing the carrying out and completion of the work; the actual construction work is divided into 'packages' to be undertaken by specialist 'works' or 'trade' contractors, and let on a rolling programme basis with the design of later packages overlapping the construction of earlier ones.

As far as design responsibility is concerned, this can lie entirely with the client's directly appointed design consultants, in the same way that it would with traditional procurement. Each separate trade contractor is supplied with all the information it needs to construct its section, and carries no design liability. However, some packages could be let on a design-build basis, with the specific package contractor responsible for part or all of the design. Managing the interfaces between packages is critical to the success of the project, particularly when packages are designed by different parties.

In contrast to the single point responsibility of design-build procurement, the management route involves the disaggregation of the contractual strategy into multiple contracts, and requires the client to be closely involved in the tendering and integration of each of the constituent parts. In fact, its key distinguishing feature is that the client selects all the separate specialist contractors, in contrast to other methods where this responsibility lies mainly in the hands of the contractor. Although this disaggregation places design-build and management approaches at

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opposite ends of a spectrum, they share the common feature that, unlike in traditional procurement, design is developed in parallel with construction.

There are several variants of management procurement practised in the UK, but management contracting and construction management are the two most common types. In both, the client usually starts by appointing consultants to prepare project drawings, a project specification and a cost plan.

Management procurement: variants and hybrids

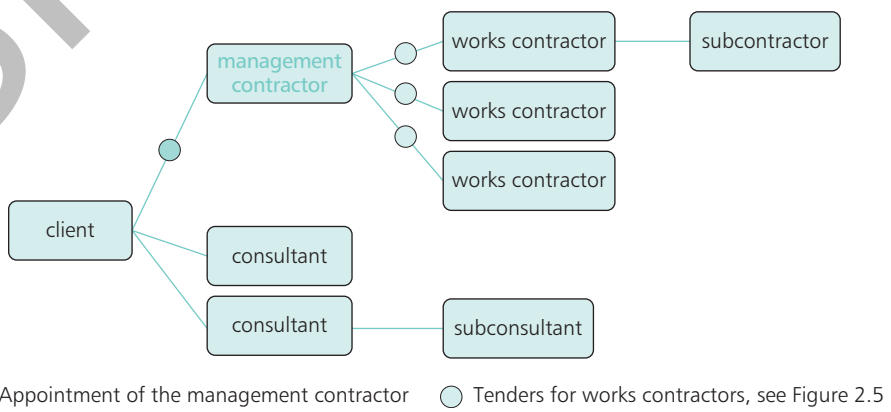
Management contracting

In the variant termed 'management contracting', the contractor enters into a management contract with the client and separate contracts with successive works contractors (Figure 2.3). The works contractors are directly and contractually responsible to the management contractor.

The management contractor's role is literally to manage the execution of the work and it is not usually involved in engaging labour or purchasing materials directly in order to carry out any of the construction work, although it may provide on-site management staff and attendance. It will arrange for the tendering of the packages but will not enter into any works contracts until these have been agreed with the client and the consultant team.

This method is possible using JCT's Management Building Contract (MC16) (with JCT's Management Works Contract (MCWC) for the packages), or the NEC4 with main Option F. In either case, the works contractors could be required to undertake design; under the JCT form, the management contractor would not be responsible for their design, while under the NEC form the contractor accepts liability. In both

Figure 2.3: Management procurement: management contracting – contractual relationships



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cases the management contractor is paid the total prime cost of all the separate packages and it, in turn, pays the works contractors.

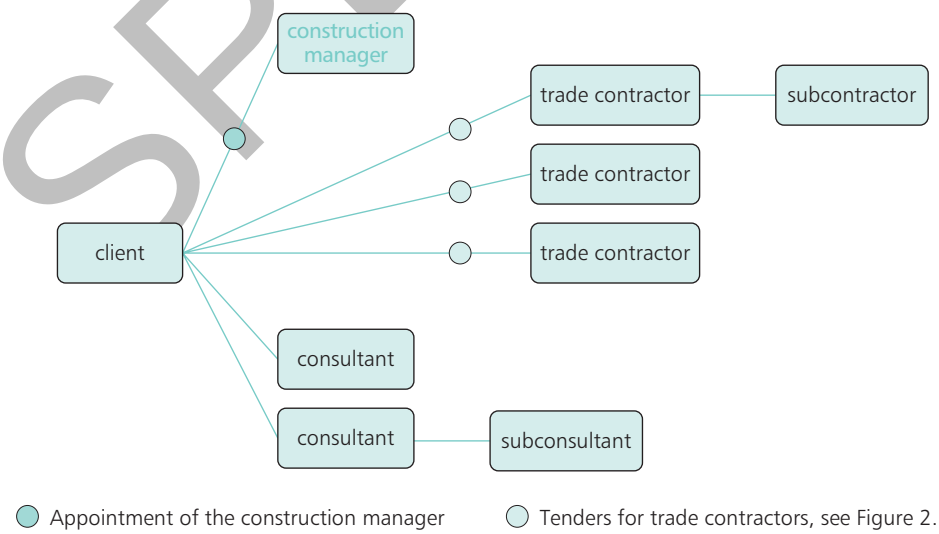
Construction management

In the second variant, construction management, the client takes overall responsibility for directing the project and enters into contracts with the specialist trade contractors (Figures 2.4 and 2.5). The construction manager acts purely as an adviser to the client, arranging for the tendering of the packages and coordinating the specialist companies' work. As the trade contractors are directly and contractually responsible to the client, the construction manager is, in certain respects, less accountable for time and cost outcomes, while the client takes on the greater proportion of the risk. This method is possible using the JCT's Construction Management Appointment (CM/A16) with JCT Trade Contract (CM/TC) for the packages, or using NEC4 for the packages and appointing the construction manager under the NEC4 Professional Services Contract (PSC). In either case, the trade contractors are paid direct by the client.

Design-manage contracting

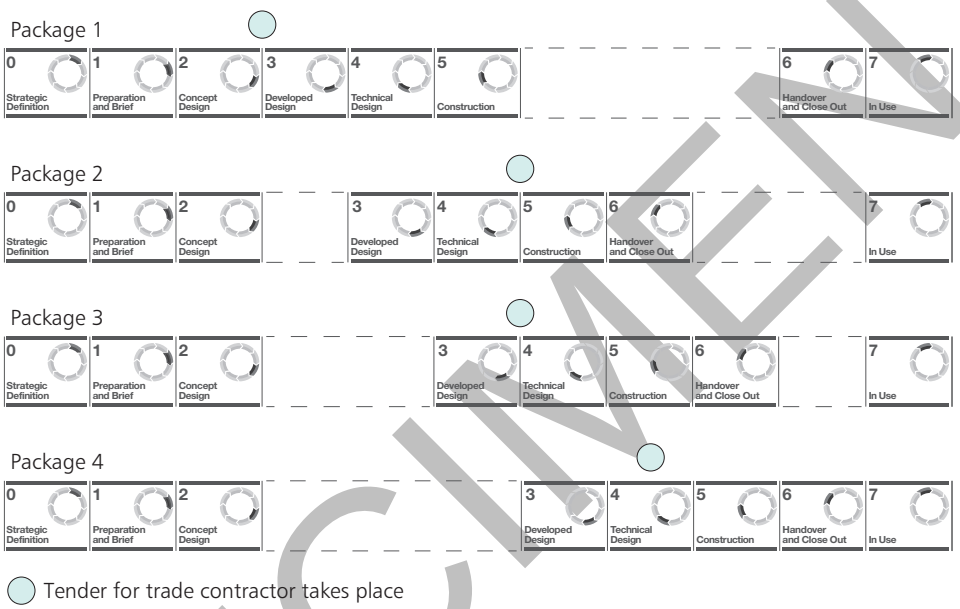
This variant (sometimes termed 'design-manage-construct') is similar to construction management except that the construction manager will also manage the design team as well as the separate packages – in the two routes detailed above, one of the design consultants might take over the project lead role or the client body would handle overall management.

Figure 2.4: Management procurement: construction management – contractual relationships



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Figure 2.5: Management procurement: construction management – tendering and RIBA Plan of Work 2013 stages



Design-manage is usually featured as a contractor-led procurement method, but there is no reason why it could not equally well be architect-led. Indeed, in those cases where smaller projects are carried out under a series of direct works or trade contracts and coordinated by the architect in the absence of a main contractor, this approach comes close to being such a procurement method. It does, however, demand a degree of highly specialised expertise and experience in setting up and managing site operations, which most architects are unlikely to possess.

Note that, although often considered a relatively recent development, in the past this was the normal method of procurement in many places, for example Scotland, and it is still often used for smaller and domestic projects. It used to be referred to simply as 'separate trades' and is now sometimes called 'self-build'; in both cases the client and architect handle the management of the project together.

Collaborative

Key characteristics

The fourth method of procurement is often termed 'collaborative',[13] although it is also referred to as 'integrated'. This is the most recent procurement method to

13 See eg Hughes, W., Champion, R. and Murdoch, J., *Construction Contracts: Law and management*, 5th edition (Oxford: Routledge, 2015).

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appear. The approach embodies some of the characteristics of relational contracts,[14] where the arrangements between the parties are adjusted over time to maximise mutual benefits. Key aspects of collaborative procurement have been defined as:

- joint working
- effective communications
- trust
- openness
- common objectives
- agreed problem resolution methods
- proactive focus on continuous measurable improvements.[15]

As with the above three procurement methods, collaborative procurement can encompass a range of different arrangements.

Collaborative: variants and hybrids

Alliancing

Alliancing has grown out of the concepts underpinning partnering, which has been in use in the UK for over 20 years (see below). It is difficult to pinpoint exactly when the term 'alliancing' emerged in the UK but, by 2015, alliancing was being used to procure large-scale infrastructure projects, such as upgrading Network Rail's and Anglia Water's service provision. *Improving Infrastructure Delivery: Alliancing code of practice*, published by HM Treasury in 2015, defines the key characteristics as:

- a collaborative and integrated team brought together from across partners and owners to deliver a programme or project
- shared commercial goals, aligned directly with customer or project outcomes
- integrated teams, developed on a best-for-task basis
- underpinned by a commitment to key working principles and trust based relationships
- an emphasis on creating the right culture and behaviours, including no-blame
- strong, collective and unanimous leadership.

One of the key constituent precepts of alliancing is the concept of integrated teams. Partnering, and many of its underlying principles, can be used alongside any of the three procurement routes described above. However, under alliancing, the key

14 For theory of relational contracts, see eg Campbell, D., *Ian Macneil and the Relational Theory of Contract*, CDAMS Discussion Paper 04/1E (2004); Campbell, D. and Harris, D., 'Flexibility in long-term contractual relationships: the role of cooperation', *Lean Construction Journal*, 2 (2005), pp. 5–29.

15 Pinsent Masons, *Collaborative Construction: More myth than reality? A critical review of the theory and practice of collaborative working in construction* (London: 2016), p. 12.

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parties involved, including client, consultants and the full supply chain, will also enter into an agreement whereby they undertake to share the risks and rewards of the project. Because of the degree of risk that this approach places on each member, the alliancing arrangement is often made on a 'no claim, no blame' basis (ie all parties agree that they will not attempt to claim back any losses from any other party), and coupled with special insurance arrangements (see the following section on integrated project insurance).

Alliancing is normally used for very large scale projects. The *Alliancing Code of Practice* states that it is not suitable

> Where certainty of price or time is the overriding requirement. Where certainty is more important than efficiency or performance improvement a greater degree of performance risk will be passed to the supply chain. This is more consistent with traditional contracting models than the risk balance required in a collaborative model.[16]

Contracts specially drafted for alliancing procurement, such as NEC4 Alliance Contract and the ACA's Framework Alliance Contract (FAC-1) provide such mechanisms, and JCT's Constructing Excellence Contract (CE16), used in conjunction with the Project Team Agreement (CE/P), would also integrate the team as required.

Collaborative: hybrids and variants

Partnering

Partnering was first used by the US Army Corps of Engineers in the late 1980s and was first applied in the UK in the North Sea oil and gas industries during the early 1990s.[17] Shortly afterwards, the UK government commissioned Sir Michael Latham to review the construction industry's procurement routes and contracts and propose solutions to the problems that the industry was facing. The resulting report[18] criticised the fragmented nature of the industry, finding that the normal procurement routes were inefficient and fostered an adversarial culture. It called for a more integrated and collaborative approach, and advocated the use of partnering. This influential report was swiftly followed by further initiatives and reports, including *Partnering in the Team*[19] and *Trusting the Team*.[20] In 1998, the new concept of partnering was given further support by the government-sponsored Egan report.[21]

16 HM Treasury and the Infrastructure Client Group, *Improving Infrastructure Delivery: Alliancing Code of Practice* (London: HMSO, 2015), p. 4.
17 Skeggs, C., 'Project partnering in the international construction industry', *International Construction Law Review*, 20(4) (2003), pp. 456–82.
18 Latham, Sir Michael, *Constructing the Team* (London: HMSO, 1994).
19 Construction Industry Board, *Partnering in the Team* (London: Thomas Telford, 1997).
20 Bennett, J. and Jayes, S., *Trusting the Team: The best practice guide to partnering in construction* (Reading: Centre for Strategic Studies in Construction, The University of Reading, with the partnering task force of the Reading Construction Forum, 1995).
21 Egan, Sir John, *Rethinking Construction: Report of the Construction Task Force* (London: HMSO, 1998).

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The partnering approach focuses on cooperative (rather than adversarial) working to achieve common aims. It has been defined as:

> a management approach used by two or more organisations to achieve specific business objectives by maximising the effectiveness of each participant's resources. The approach is based on mutual objectives, an agreed method of problem resolution and an active search for continuous measurable improvements.[22]

In theory, therefore, partnering can be used along with any of the forms of procurement detailed above, and many projects carried out under design-bid-build, conventional design-build or management methods are undertaken in a collaborate and mutually supportive spirit. Nevertheless, there are benefits to incorporating these aims in the contractual documentation. There are two principal ways of doing this: the first is for parties to agree a simple 'mission statement', which sets out the parties' intention to work in a cooperative manner, in good faith, to achieve mutual goals. This could be done in a separate document, operating alongside the normal standard forms, and the JCT publishes a Partnering Charter which can be used in this way (and is available free of charge[23]). The second is to embed partnering provisions within the contract itself, with the ACA's PPC2000 being the first example of a standard form which embodies partnering principles. In addition to a statement of intent, the parties can be incentivised to achieve the client's goals by incorporating mechanisms for sharing risks and rewards, linked to defined targets (eg that any cost savings below the target cost will be shared between the parties) – often referred to as 'pain/gain' mechanisms. This second method has been further developed into alliancing.

Partnering was originally intended to be an arrangement that encompassed a number of projects (known as strategic partnering); however, it is also used on single projects (known as project partnering). An example of strategic partnering would be a supermarket working with selected partners on a series of projects for new stores, with the agreed aims of reducing defects and increasing energy efficiency. Clearly, if the partners work together on several projects, then lessons learned from one can be applied to subsequent projects, and the chances of achieving the goals will greatly increase.

Frameworks

A procurement framework is an agreement made with suppliers that, among other things, includes terms (in the form of a template contract) that will form the basis of contracts that may be awarded during the life of the agreement. 'In other words, it is a general term for agreements that set out terms and conditions for making specific purchases (call-offs).'[24] Once the buyer has set up a framework, it can

22 Op. cit., *Trusting the Team*, p. 2.
23 Available at www.jctltd.co.uk.
24 See constructingexcellence.org.uk/tools/frameworkingtoolkit/what-is-a-framework/.

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initiate a project without conducting further tendering exercises in full. This enables the buyer to develop a long-term relationship with suppliers, where the basis of that relationship is clearly defined. The suppliers gain an understanding of the aims of the buyer, and the buyer gains a full knowledge of the strengths and abilities of those within the framework.

Frameworks are typically used by government organisations and public bodies with an extensive need to procure goods and services and where such procurement falls under the Public Contracts Regulations 2015. Provided that the first round of tendering for membership of the framework complies with the Regulations, the 'call-off' projects will not need to be individually tendered. Although frameworks have generally been set up under bespoke arrangements, the publication of two standard forms in 2018 – the NEC4 Framework Contract and the ACA's FAC-1 – may mean that these are adopted by clients in the future.

NHS ProCure22

Developed from its predecessor, ProCure21, which ran from 2003 until 2016, ProCure22 is an example of a framework agreement with supply chain teams that allows different NHS clients or joint ventures to select a supply chain for a capital investment construction scheme without the need to go through the public procurement process afresh. It is administrated by the Department of Health and Social Care for the development and delivery of NHS and social care capital schemes in England.

Integrated project insurance

Integrated project insurance (IPI) is the term used by the government for the third of the three procurement methods it favours. It was developed for government use by the company Integrated Project Initiatives Ltd in conjunction with insurance brokers Griffiths & Armour and has been used on government trial projects (but not beyond this context).[25] Its key distinguishing feature is the use of an innovative project insurance policy, which packages up construction-related insurances that would normally be held by the client, consultants, contractor, etc (ie the whole supply chain) and, in addition, covers any cost overruns on the project, above an agreed threshold, and latent defects. Altogether, it provides cover for the following:

- construction 'all risks' (including terrorism)
- third party liability (including non-negligent liability)
- delay in completion (resulting from damage)
- financial loss
- latent defects (for 12 years).

25 Cabinet Office, *The Integrated Project Insurance (IPI) Model: Project procurement and delivery guidance* (London: HMSO, 2014). Available at: www.gov.uk/government/publications/integrated-project-insurance.

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All parties are bound by a pain/gain mechanism whereby any losses up to an agreed threshold are shared (ie the total pain share equals the excess under the financial loss section of the IPI policy). This mechanism, along with other collaborative measures, is embodied in an alliance contract.

As the insured risk is high, the insurers have a major input into the management of this procurement route. The IPI route provides for an independent facilitator to work with an 'advisory team' in assisting the client throughout all stages, for example with the appointment of the parties, generating the strategic brief, approving and commenting on the developing design, assembling the procurement documentation and monitoring the progress of construction.

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Selecting a contract 3

Introduction

The first step in selecting a standard form contract will normally be to identify the overall procurement route to be followed. Table 3.1 lists most of the forms covered in this book under the procurement route or routes for which they are most likely to be used. Generally, the classification is taken from the publisher's recommended use, rather than listing all the situations in which they could possibly be used (for example, the JCT MWD contract could be used where no contractor design input is required, but this is not its primary purpose). As can be seen, many standard contracts, in particular the NEC4 ECC and the CIOB TCM, are designed to be used for several procurement routes.

Identifying the preferred procurement route is, however, unlikely to narrow down the options to just one contract and a further sift through the options will therefore be needed. This chapter looks in more detail at specific characteristics of standard forms as an aid to pinpointing the optimum choice.

First, it groups contracts under particular client sectors. This can be key, as clients will need to select forms that comply with the legislative (and possibly policy) requirements that apply to their sector.

The chapter then looks at design strategy, as this is normally a fundamental determinant in selecting a form. For example, if a particular firm will be required to design part of the works, the parties must select a form that allows for this. Such forms can, of course, be found under the 'design-bid-build with contractor design' category, but also within management procurement routes and in integrated arrangements.

Another approach is to examine the risk profile of the contract and how it balances time, quality and cost. This chapter therefore considers risk distribution in general and the ways in which standard forms deal with risk. It proposes using a radar diagram as a tool to identify areas of risk that are of particular concern.

The remainder of the chapter explores specific characteristics of the contracts in greater detail, examining issues of timing, cost and quality control.

Selecting a contract: nature of client body

Public sector clients

The choice of contract to be used by public sector clients will be affected by both policy and legislation. These two determinants also overlap to an extent, as much of the legislation affecting procurement is policy driven. In the past, construction work

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Table 3.1: Contracts grouped by procurement route

Two party: Design-bid-build	
JCT Intermediate Building Contract	JCT IC
JCT Minor Works Building Contract	JCT MW
JCT Measured Term Contract	JCT MTC
JCT Prime Cost Building Contract	JCT PCC
JCT Repair and Maintenance Contract (Commercial)	JCT RM
JCT Building Contract for a Home Owner/Occupier	JCT HO/B
JCT Building Contract and Consultancy Agreement for a Home Owner/Occupier	JCT HO/C & HO/CA
CIOB Mini Form of Contract (General Use)	CIOB M
CIOB Mini Form of Contract for Home Improvement Agencies	CIOB M/HA
JCLI Landscape Works Contract	JCLI LWC
Two party: Design-bid-build with contractor design	
JCT Standard Building Contract With Quantities	JCT SBC/Q
JCT Standard Building Contract Without Quantities	JCT SBC/XQ
JCT Standard Building Contract With Approximate Quantities	JCT SBC/AQ
JCT Intermediate Building Contract with contractor's design	JCT ICD
JCT Minor Works Building Contract with contractor's design	JCT MWD
NEC4 Engineering and Construction Contract	NEC4 ECC
NEC4 Engineering and Construction Short Contract	NEC4 ECSC
FIDIC Red Book	
CIOB Time and Cost Management Contract	CIOB TCM
RIBA Concise Building Contract	RIBA CBC
RIBA Domestic Building Contract	RIBA DBC
Two party: Design-build	
JCT Major Project Construction Contract	JCT MP
JCT Design and Build Contract	JCT DB
FIDIC Yellow Book	

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Table 3.1: continued

ICC Design and Construct Version	ICC D&C
CIOB Time and Cost Management Contract	CIOB TCM
Two party: Turnkey	
FIDIC Silver Book	
CIOB Time and Cost Management Contract	CIOB TCM
Two party: Design-build-operate	
NEC4 Design Build and Operate Contract	NEC4 DBO
Two party: Management	
JCT Management Building Contract	JCT MC
JCT Construction Management Appointment	JCT CM/A
Two party: Multi-project, collaborative	
JCT Framework Agreement	JCT FA
NEC4 Framework Contract	NEC4 FC
Multi-party: Collaborative	
JCT Constructing Excellence Contract and Project Team Agreement	JCT CE + CE/P
NEC4 Alliance Contract	NEC4 ALC
ACA Standard Form of Contract for Project Partnering	PPC2000
ACA Framework Alliance Contract	FAC-1

for government departments was invariably carried out under one of the GC/Works contracts, then the responsibility of the Department of the Environment. Although these have not been updated to comply with current legislation, they are still used occasionally (and the suite is covered in Chapter 13). However, most public sector projects are now let on other standard forms.

As noted earlier, the government has for some time been endeavouring to improve the efficiency of public sector project procurement. This drive to achieve efficiency has generally focused on particular procurement routes but sometimes also points to specific contracts. For example, the *Final Report to Government by the Procurement/ Lean Client Task Group 2012*[1] concluded that cost-led procurement trials should use NEC3 Option C, integrated project insurance should use PPC2000 and two stage

1 Available via www.gov.uk/government/publications/government-construction-task-groups.

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Table 3.2: Comparison of contracts covering framework agreements and integrated teams

	JCT CE	JCT CE/P	JCT FA
Number of pages (excluding guidance)	67	31	26
Two-party or multi-party	Two-party	Multi-party	Two-party
Single or multiple projects	Single	Single	Multiple
Number of stages	One	One	One
Cross-party liability	N/A	No, clause 2.9: 'shall not owe each other a duty of care' except for incentive payments	N/A
Incentives to meet targets	Yes, target cost option	Yes, clause 3.10	No
Penalties for failure to meet targets	Yes, target cost option	Yes, clause 3.11	No
Additional requirements to initiate work or services	No further contracts needed (although separate schedules of services are essential)	No	Yes, tasks may be provided under a separate 'underlying contract'; requires a call-off order
Priority	Clause 1.5, conditions prevail over any framework	Clause 1.5, CE/P prevails over underlying contracts	Clause 6, underlying contract prevails over framework
Applicable law – UK or international	English law applies	English law applies	English law applies

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NEC4 Option X12, X22	NEC4 FC	NEC4 ALC	PPC2000	FAC-1
2, 2	5	45	60	35
Two-party	Two-party	Multi-party	Multi-party	Multi-party
Single	Multiple	Single	Single	Multiple
One, two with X22 (only with Option C or D)	One	One or two	Two, commencement agreement required prior to start on site	One
No, but there are joint incentive payments	N/A	No, but agree not to bring claims, clauses 94 and 95, see also Option X18	Yes, clause 22.1 'shall owe each other such duty of care'	Yes, limited, clause 10.2 'shall owe each other such duty of care', with exclusions
Yes, X12.4	No	Yes, clause 53	Yes, clause 13.2, if set out in Project Partnering Agreement (PPA)	Optional, clause 2.4
No	No	Yes	Yes, clause 13.2, if set out in PPA	No
No	Yes, a works order or time charge order, clause 20.3	No	No, although commencement order needed for start of second stage (construction)	Mixed. Generally separate contracts needed, limited tasks can be required under FAC-1 alone
N/A	Not stated	No, is 'entire agreement'	Clause 2.6, commencement agreement and PPA prevail over PPC terms	Clause 1.5, project contract prevails over framework documents
Parties state	Parties state	Parties state	Opportunity to select law, but terms refer to eg CDM Regulations, clause 7.1	Opportunity to select law, but terms refer to eg CDM Regulations

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open book should use JCT Constructing Excellence.[2] Recent policy documents have stopped short of recommending specific forms; nevertheless, the strong push towards particular procurement routes, such as framework arrangements, integrated teams and alliancing approaches, will tend to narrow the range of suitable standard forms available for selection. Table 3.2 compares the key features of forms that reflect these preferred arrangements.

Local authorities, as well as being involved in large-scale projects, often need to let smaller enabling works contracts and undertake regular programmes of work on a smaller scale. Suites of contracts that include forms which are appropriate for large projects and small works are very attractive; for example, using the NEC4 Short Contract in conjunction with the NEC4 Framework Contract, or the JCT Minor Works Building Contract in conjunction with the JCT Design and Build Contract. The JCT, NEC, FIDIC, CIC and Property Advisers to the Civil Estate (PACE) all publish large suites of forms that include coordinated 'short' contracts and back-to-back subcontracts.

A key, ongoing government initiative is the drive to promote fair payment provisions. This aspiration is reflected in the policy document *Construction 2025*,[3] which calls for equitable financial arrangements and certainty of payment throughout the supply chain. The aims are reflected in both government initiatives, such as the *Construction Supply Chain Payment Charter 2014* (revised 2016),[4] and legislation, namely the HGCRA (as amended), the Late Payment of Commercial Debts Regulations 2013 and regulation 113 of the Public Contracts Regulations 2015. The Public Contracts Regulations require that the final date for payment should be 'no later than the end of a period of 30 days from the date on which the relevant invoice is regarded as valid and undisputed' (regulation 113(2)(a)), and that similar provisions are included in subcontracts and sub-subcontracts. Under the latest versions of the charter, the value of work and materials supplied by all three tiers of suppliers is to be assessed as at the same date, to minimise the time lag between payments to tier 1 construction firms (main contractors) and those lower down the supply chain.

Public bodies are also subject to regulations that do not affect other clients. The Public Contracts Regulations 2015 are, of course, vital in determining the way in which public sector projects must be tendered, but they also include provisions relating to transparency, bribery and fair payment. Breach of the statutory provisions relating to these matters is frequently made a ground for termination under standard forms (for example, under clauses 8.6 and 8.11.3 of JCT SBC16; also, under Supplemental Provision 8 the contractor must include similar provisions in any subcontract).

2 Ibid., p. 5.
3 HM Government, *Construction 2025: Industrial strategy for construction – government and industry in partnership* (London: Department for Business, Innovation and Skills, 2013).
4 Construction Leadership Council, *Construction Supply Chain Payment Charter*, Industrial Strategy: Securing jobs and a stronger economy (London: Department for Business, Energy and Industrial Strategy, 2016).

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Table 3.3: Legislative framework

	Public sector clauses (Bribery Act 2010, Public Contracts Regulations 2015)	HGCRA compliant	Reference to consumer cancellation
JCT SBC	Schedule 8	Yes	No
JCT IC/ICD	Schedule 3	Yes	No
JCT MW/MWD	Yes	Yes	No
JCT DB	Schedule 2	Yes	No
JCT HO/C & HO/CA	No	No	Yes
RIBA CBC	Yes	Yes	No
RIBA DBC	No	No	Yes
NEC4 ECC	No	Y(UK)2	No
NEC4 ECSC	No	No	No

Public bodies are also subject to the Freedom of Information Act 2000, which provides public access to information held by public authorities. It does this in two ways: public authorities are obliged to publish certain information about their activities and members of the public are entitled to request information from public authorities. The JCT incorporates this by providing that the parties accept that the contract is not confidential, except for material that may be 'exempt' and which the employer has the discretion to determine. References to these legislative requirements are summarised in Table 3.3.

Private commercial clients

Private commercial clients are not subject to the procurement policies that affect public bodies and therefore have a very wide range of choice when it comes to selecting appropriate contracts. Nevertheless, commercial clients are subject to an increasing amount of legislation, some of which affects the content of the published forms.

A key piece of legislation relevant to commercial clients (both public and private) is the HGCRA. This followed directly on from the Latham Report[5] and was intended to implement some of the report's recommendations. It requires all construction contracts falling under the Act to include particular provisions relating to payment, suspension and adjudication (see Box 3.1). This was the first time that the UK government had intervened to control the content of construction contracts, and most standard form construction contracts were revised to comply with its requirements.

5 Latham, Sir Michael, *Constructing the Team* (London: HMSO, 1994).

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Box 3.1: Housing Grants, Construction and Regeneration Act 1996 (as amended by the Local Democracy, Economic Development and Construction Act 2009 (LDEDCA 2009))

This Act applies to all 'construction contracts', with some exceptions. The term 'construction contract' is given a wide definition and includes contracts for services only or for building work, and applies to a large range of types of work, including demolition, services installation and repair work, as well as new buildings, extensions and alterations. The Act requires that construction contracts include specific terms relating to payment (unless the contract is for less than 45 days) and adjudication:

- the right to stage payments
- the right to notice of the amount to be paid
- the right to suspend work for non-payment
- the right to take any dispute arising out of the contract to adjudication.

If the parties fail to include these provisions in their contract, the Act will imply terms to provide these rights (section 114) by means of the Scheme for Construction Contracts (England and Wales) Regulations 1998.

However, there is an important exception; it does not apply to projects where one of the parties is a 'residential occupier'. The residential occupier exception applies to projects for which the primary purpose is beneficial use by the client as a residence (section 106).

This would include buildings that the client is occupying or intending to occupy as its main residence, and might also include a second home if the client is the main user and there is no intention to use it as a holiday let.[6] However, work to buildings in the grounds of a residence that will not be lived in by the client or work to divide a property into flats where only one flat will be retained by the client will not fall under the exception.[7] Similarly, work on other residential properties, for example for landlords, local authorities or housing associations, will usually be covered by the Act.

Construction projects are, of course, subject to a wide range of other legislation and most standard form construction contracts include a term that requires the contractor to comply with all relevant statutes. Although the contractor is in any case required to comply as a matter of law, including this provision in the contract means that failure to comply will constitute a breach, for which the client would be able to claim damages (otherwise obtaining compensation would be difficult).

6 *Westfields Construction Ltd* v *Lewis* [2013] BLR 233 (TCC).
7 *Samuel Thomas Construction* v *Anon* (unreported) 28 January 2000 TCC.

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Sometimes standard forms refer to specific legislation, usually because it is of vital importance to the project and/or because the consequences of a breach can be very serious. Particularly of note are the Construction (Design and Management) Regulations 2015 (CDM Regulations) and the Bribery Act 2010. Contracts vary in the degree to which they highlight particular pieces of legislation. For example, the JCT SBC requires the principal designer and principal contractor to be identified in the contract particulars and makes a breach of obligations related to the CDM Regulations a ground for termination. The NEC4 and FIDIC suites, as they are intended for use in a wider variety of jurisdictions, do not refer specifically to the CDM Regulations. Nevertheless, they do refer to health and safety and to corruption in general terms.

A piece of legislation that is often overlooked is the Defective Premises Act 1972. This applies to all work in connection with a dwelling (ie not just to consumer clients, but to housing developers). Those that contract to undertake such work are under what appears to be a strict duty to ensure that the dwelling is fit for habitation. The impact on construction contracts is that clauses that might limit the contractor's liability to the use of reasonable skill and care would be in conflict with this statutory provision. The JCT, for example, handles this by making an exception to the contractual limit on the contractor's liability for losses, where the work relates to dwellings (e.g. DB16 clause 2.17).

The choice of standard form may therefore depend on the extent to which the client wishes to highlight specific aspects of particular legislation. However, as all standard forms intended for commercial clients deal with relevant legislation, it is likely that other factors will be more critical in making the final selection.

The practices adopted by government for its own projects may have a trickle-down effect on larger commercial clients. For example, contractors and consultants that work extensively on public sector projects may well transfer practices adopted on those projects to others, such as the use of BIM or a preference for collaborative working methods. The model projects trialled by the government have been much publicised, as have the benefits of adopting a collaborative approach to procurement. For these reasons, commercial clients may consider using one of the contracts listed in Table 3.2 above. These are complex arrangements, requiring a high level of understanding, which are likely to be most suitable for experienced clients procuring very large projects, who are prepared to devote the necessary resources to setting up the contractual arrangements.

For the majority of commercial projects, the choice of form is likely to depend primarily on the range of specific provisions it contains. Table 3.4 sets out an overview of the key features of some of the contracts covered in this book which are intended for commercial projects, identifying the relevant clauses and other references. For more detailed discussion of design strategy, and issues of time, quality and cost, see the relevant sections of this chapter.

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Table 3.4: Key features of contracts intended for commercial work

	JCT SBC	JCT ICD
Collaborative working clause	Optional, Schedule 8: 1	Optional, Schedule 5: 1
Contractor design	2.2	2.1
Client-/customer-selected subcontractors	Named specialist (not for design)	Named sub-contractors
CDP submission	2.9.4	2.10.2
Professional indemnity insurance required	6.15	6.19
Programme required	2.9	No
Sectional completion	2.4	2.4
Partial possession	2.33	2.25
Payment for off-site items	3.8	4.9.1.3
Variation quotation	5.3	No
Loss/expense	4.20	4.15

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Consumer clients

Clients undertaking work to a residential property can be treated as a separate category, partly because they are affected by a different range of legislation, but also because the projects they undertake are likely to be smaller in scale.

In terms of legislation, not all of the legislation that affects commercial clients applies to their projects and, conversely, such clients are subject to consumer protection legislation that does not apply to business contracts.

The HGCRA, as noted above, does not apply to contracts where one of the parties is a residential occupier of the property on which the construction work is to be carried out. If this is the case, the provisions regarding payment (including payment notices and pay less notices) and the right to adjudication are not needed. These provisions support the supply side, as they were drafted following the Latham Report and aimed to ensure prompt payment to the contractor. They are quite complex and include strict time limits. Some thought should be given to whether a residential occupier client would wish to include these provisions or would prefer a simpler payment regime, in which case a form that does not include them may be preferable.

A further distinction is whether the client is a 'consumer' for the purposes of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (Box 3.2) and the Consumer Rights Act 2015 (Box 3.3). A consumer is defined

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NEC4 ECC	FIDIC Red Book	ICC D&C	CIOB TCM
10.2	No	6.1	4.1
21.1	4.1	6.3	16
No	Nominated, 5.2	7	Listed, 29.3
21.2	4.1	4.8	15.1
Option X15.5	19.2.3	17.10	If stated in Special Conditions
31.1	8.3	9.1	37.1
Option X5	8.2	10.3	5.4
35.2	10.2	10.3	53.1
Possible under all payment options	No	No	No, 61.2.4
62	13.3.2	12.4	44.2
60	No	13.1	44.1

as a person 'acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession', and is therefore a slightly wider category than 'residential occupier' (a person could, for example, have contracted to do work to a family member's dwelling). The person must be acting as an individual, and not as a company. The Consumer Rights Act 2015 sets out what might be considered an unfair term in a consumer contract, so in those circumstances it would be essential to select a contract that has been drafted with these criteria in mind. In addition, the consumer must be provided with access to a cancellation form, and therefore contracts drafted for consumers normally include one.

Box 3.2: Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013

These regulations became effective on 13 June 2014 and extended the existing law on cooling-off periods and cancellation rights for consumers. Under the regulations, a trader must include a cooling-off period of at least 14 days and provide the consumer with a cancellation form (or access to one). Where a service has been started within the cancellation period at the request of the consumer, but has not been completed, the consumer will have to pay for the service used during the time up to the cancellation. Pre-contract information as outlined in schedules to the regulations must also be provided.

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Box 3.3: Consumer Rights Act 2015

This Act, which came into force on 1 October 2015, consolidated much of the pre-existing legislation on consumer protection and introduced some significant new provisions. It replaced the sections of the Unfair Contract Terms Act 1977 that relate to consumers and repealed the Unfair Terms in Consumer Contracts Regulations 1999. It applies to contracts and notices between a 'trader' and a 'consumer'. A 'consumer' is defined as 'an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession' (section 2(3)).

The Act applies to a wider range of contracts than other legislation commonly encountered by construction professionals. For example, under the HGCRA (as amended) only contracts with a residential occupier are excluded. It is therefore quite possible that the Consumer Rights Act will apply to a contract that is excluded from the HGCRA (eg where an individual undertakes work to a domestic property that is not the individual's main residence).

The Act states that any contract for services is to be treated as including a term that the trader must perform the service with reasonable care and skill (section 49(1)). In addition, if the contract does not provide for a price or timescale, it is taken to include a term that the services will be provided for a reasonable price (section 51) and within a reasonable timescale (section 52). Goods supplied under such a contract must also be of good quality.

Part 2 sets out the law regarding unfair terms in relation to consumers. Section 62(1) states that an unfair term of a consumer contract is not binding on the consumer. The test for 'unfair terms' in the Act is the same as that in the 1977 Unfair Contract Terms Act: it provides that a 'term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer' (section 61(4)). An 'indicative and non-exhaustive list' of examples of terms that might be considered unfair is set out in Schedule 2 to the Act. This includes, for example, any term which has the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, which would include an arbitration agreement.

The most significant change relates to terms specifying the main subject matter of the contract or setting the price. These terms are not subject to the 'fairness' test provided that they are both transparent and prominent (section 64(1) and (2)). 'Transparent' is defined as being 'in plain and intelligible language and (in the case of a written term) … legible' (section 64(3)) and 'prominent' as 'brought to the consumer's attention in such a way that an average consumer [who is reasonably well-informed, observant and circumspect] would be aware of the term' (section 64(4) and (5)). The new Act no longer makes an exception for terms that have been 'individually negotiated', as was the case in the Unfair Terms in Consumer Contracts Regulations 1999.

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Finally, contracts with a consumer client are generally of a smaller scale that those for which many standard forms are designed, and the client is also likely to be inexperienced in dealing with construction projects. It is therefore important to choose a form that is as concise and clear as possible. However, domestic projects are not always small and straightforward: a consumer client may embark (as an individual) on a project for a multi-million pound mansion; small projects may have complex design features that require specialist subcontractor design input; a residential project may require phasing and provision for early occupation. In these cases, one of the smaller 'residential client' contracts may not be suitable and the preference for short and simple will need to be balanced against the particular project's requirements. Where it is necessary to use a commercial form, which may not satisfy the requirements of the Consumer Rights Act, the client may need to take advice regarding the implications of the terms before entering into the contract. Table 3.5 compares the provisions of shorter forms of contract, identifying the relevant clauses and other references.

Selecting a contract: design

Key questions that determine the selection of a standard form are:

- Will the design be provided entirely by the client (normally through its consultant team)?
- How much design input will be required from the contractor and/or any specialist subcontractors?
- Will the design be completed before or after construction begins and, if afterwards, how will the developing design be monitored?

Extent of contractor design

Design entirely demand side

Early standard form contracts, such as JCT63, assumed that the contractor would be provided with detailed information about the works to be carried out. Generally, the project would be fully designed before it was tendered and, if any information was missing, this would be provided by the employer's consultants during the course of construction.

This approach ensures a very high degree of control over the quality of the constructed project and a number of standard forms adopt this approach, for example JCT's MW16 and IC16, and the NEC4 ECSC.

Even where full information is not available at the start of construction, it is still possible to proceed on the basis that the whole design will be provided by consultants appointed by the client. Prime cost and measured term contracts, such as the JCT's MTC and PCC, can proceed on this basis. Management arrangements could also be set up without supply side design input.

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Table 3.5: Shorter contracts compared

	JCT MWD	JCT RM	JCT HO/C & HO/CA	NEC4 ECSC	RIBA CBC	RIBA DBC
Drafted for consumer clients	No	No	Yes	No	No	Yes
Collaborative working clause	No	No	No	10.2	3	3
Public sector clauses	6.6, 6.10 and Schedule 3	No	No	17	24	No
Risk register	No	No	No	No	Referenced	Referenced
Contractor design	2.1.1	No	No	20, if in Scope	Optional	Optional
Client-/customer-selected subcontractors	No	No	No	No	Optional	Optional
CDP submission	2.1.3	No	No	20.2	15.2	15.2
Professional indemnity insurance required	No	No	No	No	Yes	Yes
Programme required	No	No	No	31.1	Optional	Optional
Sectional completion	No	No	No	No	17	17
Partial possession	No	No	No	No	9.12	9.12
Variation quotation	No	No	No	62	5.11	5.11
Loss/expense	Limited	Limited	Limited	60	9.7	9.7
Customer cancellation	No	No	No	No	No	Yes
Insurance-backed guarantee	No	No	No	No	Optional	Optional

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In the case of JCT IC16, it is possible to name specialist subcontractors to undertake design, and in the JCT's MC and CM/TC the separate packages may include a design portion, but in none of these instances does the main contractor (or construction manager) accept any liability for that design.

Limited design input by main contractor

The majority of standard forms that are frequently grouped under 'traditional' procurement could now be more accurately described as falling between the categories of pure traditional and design-build. In these contracts, the main contractor takes on responsibility for designing an identified part or parts of the project (often termed the contractor's designed portion, or CDP). These parts excepted, it is assumed that the contractor will be provided with full design information, and responsibility for coordination of the interface between the CDP items and the rest of the project lies with the client or its contract administrator.

In integrated approaches, such as that adopted by PPC2000, the contractor may make a design contribution if it is brought in as a design team member; otherwise it would be supplied with all necessary information by the design team.

Design completed by contractor

In many of what are termed 'design and build' contracts, the contractor assumes responsibility for *completing* the design, not for the whole design. This is the approach taken in JCT DB16 and the FIDIC Yellow Book. Integral to this approach is the provision that the contractor will not be held liable for any errors in information supplied to it at tender stage, often termed the 'employer's requirements'. Examples of clauses making this clear are JCT DB16 clause 2.11 and FIDIC Yellow Book clause 1.9 (in the latter case, the contractor would, however, be liable if it was an error a competent contractor should have discovered). If the concept or detailed design is reasonably developed, then the employer will increase its control over the final quality but will lose the 'single point of responsibility' advantage, which is often cited as a reason for selecting the design-build route.

Design entirely by contractor

This is a high risk arrangement from a contractor's point of view, if it accepts responsibility for ensuring that the whole project meets the client's stated needs, including liability for any errors in any partially developed design provided to it at tender stage. The only contract to include such a provision as standard is the FIDIC Silver Book; however, some forms, such as PPC2000, offer this as an option (note that other forms are often amended by the client to achieve this result). While this approach has the merit of establishing a true single point of responsibility, the contractor is likely to charge a high price for assuming this risk.

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Figure 3.1: Extent of contractor design responsibility

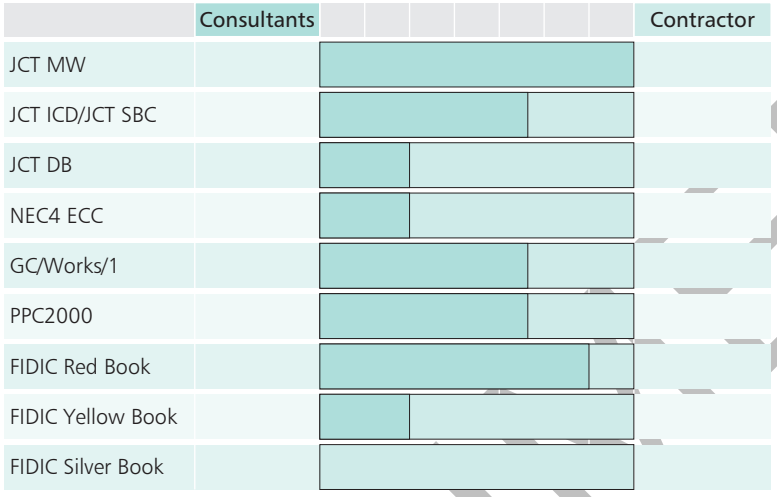


Figure 3.1 illustrates the extent of contractor responsibility for design in some of the standard forms covered in this book, although this will depend on how they are used, while Table 3.6 details the contractual provisions.

Level of liability for design

As well as the extent of the contractor's design responsibility, the level of design liability is also an important factor in the contract selection process. Two levels of liability are possible: the first is the equivalent to that normally assumed by a professional consultant, ie to use 'reasonable skill and care' (sometimes termed a negligence-based liability); and the second is a strict obligation to achieve a result (sometimes termed a 'fit for purpose' liability). The second would be the default level if the contract contains no clauses covering the level (under English law), and is more onerous on the contractor as, in order to prove a breach, the client simply needs to show that the finished building does not meet the employer's requirements. With the first level of liability, the client additionally needs to show that the contractor did not use reasonable skill and care. Although the second option may be more attractive to a client, this needs to be balanced against the additional cost that may result from the contractor accepting this risk. The availability of insurance to cover this increased risk should also be considered.

The forms vary in terms of the level of liability set, with some offering both of the above options so that the client can make a choice – as with all optional provisions, the selection would need to be made clear at tender stage. The various options are set out in Figure 3.2.

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Table 3.6: Provision for contractor design

No provision	Optional, portion must be specified	Completed by contractor	Entirely by contractor	Specified subcontractor option
JCT HO/C & HO/CA				
JCT RM				
JCT MW	JCT MWD			
JCT IC	JCT ICD			JCT ICD
JCT MTC	JCT SBC	JCT DB		JCT DB
JCT PCC	JCT MC and JCT CM/TC	JCT MP		JCT MP
	JCT CE, if in contract particulars	JCT CE, if in contract particulars	JCT CE, if in contract particulars	
	NEC4 ECC if in scope	NEC4 ECC if in scope		
	FIDIC Red Book	FIDIC Yellow Book	FIDIC Silver Book	FIDIC generally
	CIOB TCM	CIOB TCM	CIOB TCM	
	PPC2000, if a design team member	PPC2000, if a design team member	PPC2000, clause 22.1 option	
	RIBA CBC/DBC	ICC D&C		RIBA CBC/DBC
	GC/Works/1	GC/Works/1 DB		

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Selecting a contract: subcontracting

Most standard forms allow for the contractor to subcontract work to firms of its own choosing (often termed 'domestic' subcontractors), although this is frequently subject to the client's approval. However, instead of simply approving the contractor's choice, clients often wish to direct the contractor to sublet work to specific firms. This will be difficult if the contract selected does not include provisions giving the client the right to do this, and setting out the consequences, namely whether the contractor will remain responsible should the firm in question fail to perform.

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Figure 3.2: Level of contractor design liability

	Skill and care	Strict	Liable for employer information
JCT generally			
JCT MP		Alternative [fn. 4]	
NEC4 ECC	Option X15		
GC/Works/1	clause 10.1 Alternative A	clause 10.1 Alternative B	
RIBA CBC/DBC	clause 15.1.1	clause 15.1.2	
PPC2000		clause 22.1 option	
FIDIC Red Book			
FIDIC Silver Book			clause 5.1

One key question in particular is likely to be whether the selected subcontractor can be required to undertake design work. Very often it is not the main contractor's design input that is required, but that of a specialist firm. There are many ways of involving such firms in projects. Under a management arrangement, some of the packages can be let on a design-build basis. With design-bid-build or design-build procurement, the main contractor might be required to engage specific firms to undertake that design, and some standard forms allow for this. A key issue is whether the main contractor will accept responsibility for the specialist firm's design. If not, as in the case of JCT IC and ICD, a collateral warranty will be essential. Even if they are willing to accept responsibility, a collateral warranty may still be desirable – if the design element is crucial to the project, the client may wish to be able to claim against the specialist firm should the main contractor become insolvent. See Table 3.7 for the selected subcontractor provisions of the various contracts.

Selecting a contract: client preferences – risk, generally

One of the functions of a contract is to manage risk. Understanding the risk preferences of a client, and the way that risk is handled in different contracts, is one way of selecting the most appropriate form for a project.

The three key steps in risk management are generally considered to be identify, analyse and act. Both the identification and analysis would be processes that form part of the briefing for a project and are carried right through the selection of the procurement route and form of contract. The process of analysis serves to determine each risk's:

- probability
- degree of impact
- effect on time, quality and cost.

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Table 3.7: Provision for client-selected subcontractors

	Client can select subcontractor for work only	Before/after main contract signed	Client can select subcontractor for design and construction	Main contractor responsible for subcontractor design
JCT SBC	List of 3 minimum 'Named Specialist' (not for CDP)	Before only Before/after	Possible, if listed for CDP items No	Yes N/A
JCT IC	Named	Before/after	Named	No
JCT ICD	Named (not for CDP)	Before/after	Named (not for CDP)	No
JCT MWD	No	N/A	No	N/A
JCT CE + CE/P	Supply Chain may be specified	Before only	Supply Chain may be specified	Yes
JCT MP	Named specialist	Before only	Named specialist	Yes
JCT DB	Named	Before only	Named	Yes
HO/B and HO/C & HO/CA	No	N/A	No	N/A
NEC4 ECC	No (would need to be added in scope)	N/A	No (would need to be added in scope)	N/A
FIDIC Red, Yellow and Silver Books	Nominated	Before/after	Nominated	Yes
ICC D&C	Nominated	Before/after	Nominated	Yes
CIOB TCM	May be listed	Before only	May be listed	Yes
PPC2000	No (but Client approves all specialists)	Before/after	No (but Client approves all specialists)	Before/after
RIBA CBC/DBC	Required specialists	Before only	Required specialists	Yes

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The 'act' step essentially involves establishing how the risk can best be dealt with. Four options for risk response are normally cited: 'take or tolerate', 'treat or manage', 'transfer' and 'terminate'. Some examples are given below, assessed from the point of view of the client.

Take or tolerate

For this option, the client accepts that they will take the risk, and therefore will bear any losses that might result. An example of a risk is the occurrence of exceptionally bad weather delaying a project. In JCT SBC16, 'exceptionally bad weather' is a relevant event entitling the contractor to an extension of time; therefore, as the employer cannot recover any of its losses, under this contract it accepts this risk. A second example might be the risk of errors in the employer's requirements supplied to a contractor in a design-build contract; in JCT DB16 this risk is taken by the employer.

Treat or manage

Treating or managing a risk is often done by spreading it between parties. Insurance is the most common way of sharing risk by spreading it across the whole construction industry. Construction contracts frequently use insurance as a technique to avoid either party having to bear the entire losses should a risk event occur. Usually this is restricted to severe but unlikely events, such as a fire destroying the works. Under the contract, one of the parties is required to take out an insurance policy in 'joint names' to cover both parties (eg JCT SBC16 clause 6.7 Option C) – the cause of the fire is irrelevant, neither party will claim against the other. The client can also manage their risk by taking out a policy even where the contract does not require it; for example, it is possible to take out insurance to cover loss of liquidated damages, which in this case this would mean that the employer has accepted the risk under the contract, but managed it by taking out insurance. (See also the section on integrated project insurance in Chapter 2.)

Transfer

For this option, the client transfers the risk to the other party. Examples are that in GC/Works/1 the risk of 'exceptionally bad weather' is borne by the contractor (unlike in JCT SBC16) and in the FIDIC Silver Book the risk of errors in the employer's requirements supplied to a contractor is taken by the contractor (unlike in JCT DB16). In some cases, the parties are required to decide how much risk will be taken by the employer and how much will be transferred to the contractor. The use of the innovative risk allocation schedule in JCT CE16 is an interesting example of this apportionment approach.

Terminate

A final option is simply to terminate the risk. In the context of construction projects, this might translate into removing an element of the works. For example, if a complex piece of structure is to be inserted into an existing building and cannot be

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designed in advance of work commencing, it may be covered by a provisional sum. If, once the design is finalised, it proves extremely expensive, then the client may wish to omit this item; all contracts contain provisions allowing the client to omit work. On a larger scale, contracts also allow for the whole contract to be terminated should the client decided not to proceed. In PPC2000, the employer is entitled not to proceed to the construction phase. In JCT forms, for example SBC clause 8.11, either party may terminate the contract if work is suspended for two months (or other agreed period) for specified reasons, including force majeure, civil commotion, etc. It is obviously important that such omission/termination clauses are included, otherwise it will be impossible to handle these risks.

Contracts are therefore a means of managing risks, by making a careful selection before the construction work begins. Many also contain mechanisms for managing risk during the course of the project; this is typically done by means of a risk register. The term 'risk register' is defined in the RIBA CBC as 'a document identifying potential and actual risks which could affect the progress of the Works and setting out procedures to deal with them'. Initially, the register will list the risks and the mitigation procedures identified and agreed at the start of the project. Although the contract will set out how the risks are allocated, the register will detail exactly how they are to be handled should they arise. In this way it helps to manage not only the identified risks themselves, but also a further risk inherent in all construction projects: the risk of disputes.

Establishing a contract profile – time, quality, cost

The three most important considerations for any client are usually time, quality and cost.

Selecting a contract requires breaking down the time, quality and cost aspects into specific risks. For example, if time is identified as a key factor, what precisely are the concerns of the client? Often, late completion is the key concern. More accurately, late completion is a risk which, if it materialises, will have a high impact on the client. However, the time concerns could be quite different. It could be that an immediate start is essential (perhaps a building has been damaged and is unsafe). With cost, is it the risk of increases during construction that is of prime concern, or simply securing the lowest cost?

In initial discussions, it may help to map out a profile of the project priorities. 'Radar diagrams' provide a useful reminder of key points to be considered and can be used to record decisions. This could be simply an exercise to help focus on the balance of priorities – for example, what level of quality is required, how much time is available before construction and for operations on site, and to what extent and in what respects are cost considerations paramount.

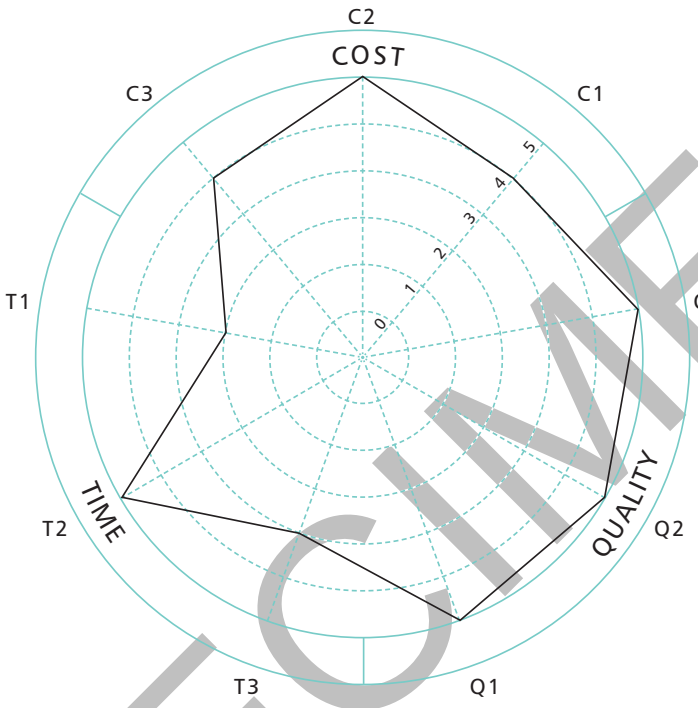
Figure 3.3 is an example of a radar diagram which presents the three elements of time, quality and cost in terms of contract priorities. Even where they are not in

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Figure 3.3: Radar diagram 1: profile A



	Criteria		Priority (0 = lowest, 5 = highest) 0 1 2 3 4 5
TIME	T1	Earliest possible start on site	✓
	T2	Certainty over contract duration	✓
	T3	Shortest possible contract period	✓
QUALITY	Q1	Top quality, minimum maintenance	✓
	Q2	Sensitive design, control by employer	✓
	Q3	Detailed design critical	✓
COST	C1	Lowest possible capital expenditure	✓
	C2	Certainty over contract price, no fluctuation	✓
	C3	Best value for money overall	✓

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conflict, these elements need to be reconciled and, ideally, balanced. Asking the right questions at the right time might result in a visual profile which allows quick comparisons, and help in arriving at the appropriate contract choice.

The radar diagram in Figure 3.3 indicates the contract priorities for a project that suggest a design-bid-build procurement route would be most appropriate. Any number of contracts could then be considered, such as the JCT SBC16, JCT IC16, NEC4 ECSC, RIBA CBC18, etc.

In cases where a client's preferences change, the contract priorities for a project may also change and a radar diagram could be used to show the effect of the changes. The radar diagram in Figure 3.4 shows an example of a situation where the client's change requires an earlier start on site and an acceptance of a lower priority for the detailed design.

The radar diagram in Figure 3.4 suggests that a design-bid-build procurement route with contractor's design would be an appropriate choice. One of the contracts that allow for contractor's design could then be considered, such as JCT SBC16, JCT ICD16, NEC4 ECC, RIBA CBC18, etc.

Selecting a contract: time

On some projects the timing is more important than any other factor. Generally, the key issue is to have the project finished by a particular date. Most contracts incorporate a start and finish date, with the right to claim damages if the project does not finish on time. Normally, these damages are liquidated, ie agreed in advance.

Other factors may be important. For example, there may be a need to start the work as quickly as possible (perhaps because there has been serious damage to an existing building), or it may be that the work needs to be carried out in stages.

There are several methods whereby the project can be started quickly; all involve accepting that there will be reduced tender information available, and that therefore the ultimate cost will not be known. A prime cost contract requires little information before it is let; the contractor tenders a fixed or percentage fee and all work is carried out after instruction. A measured term contract can be let on a bill of rates, and specific items of work ordered as and when required. A management contract can be let with information about the scope and first packages only. It is important to note that none of these are design-build arrangements, they all leave control of the design on the client's side (there is a common misconception that in order to speed up a project it is necessary to swap to a design-build route).

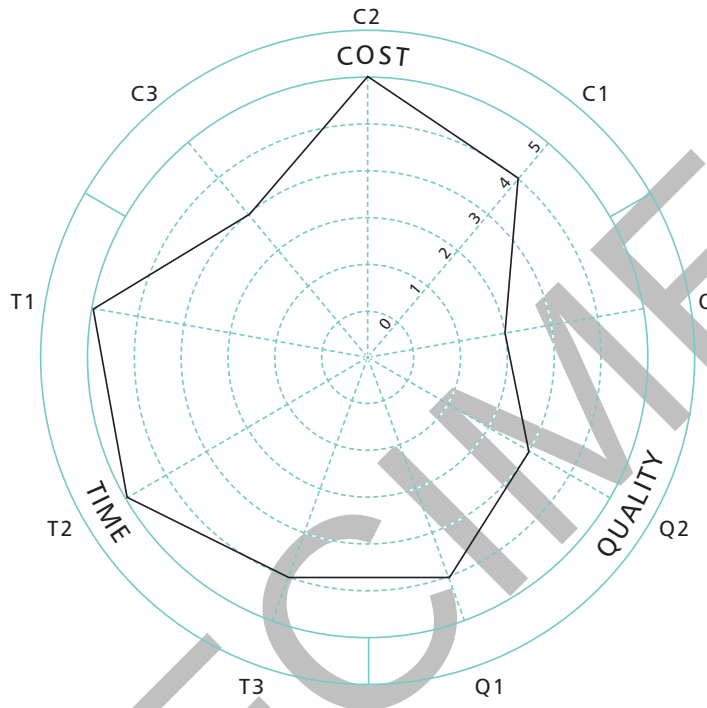
Where phased work is required, this could be carried out under a management arrangement or by using a design-bid-build or design-build contract that specifically allows for this. For example, under JCT SBC16, the works to be carried out can be split into sections, all with separate start and completion dates. This can be useful where tight control is needed over separate phases, for example a school

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Figure 3.4: Radar diagram 2 – profile B



	Criteria		Priority (0 = lowest, 5 = highest) 0 1 2 3 4 5
TIME	T1	Earliest possible start on site	✓
	T2	Certainty over contract duration	✓
	T3	Shortest possible contract period	✓
QUALITY	Q1	Top quality, minimum maintenance	✓
	Q2	Sensitive design, control by employer	✓
	Q3	Detailed design critical	✓
COST	C1	Lowest possible capital expenditure	✓
	C2	Certainty over contract price, no fluctuation	✓
	C3	Best value for money overall	✓

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Table 3.8: Key provisions on timing

	Phased start	Sectional completion	Partial possession	Acceleration bonus for early completion
JCT SBC	Sixth recital, 2.4	2.4	2.33	Schedule 2: 2
JCT IC/ICD	Eleventh recital, 2.4	2.4	2.25	No
JCT MW/MWD	No	No	No	No
JCT CE	Contract particulars, 1.1	1.1	N/A	N/A
JCT MC	Sixth recital, 2.4	2.4	2.25	Schedule 6
JCT CM/TC	Seventh recital, 2.5	2.5	2.33	Schedule 2: 2
JCT PCC	Seventh recital, 2.3	2.3	2.25	No
NEC4 ECC	X5	X5	35.2	X6
NEC4 ECSC	No	No	No	No
FIDIC Red, Yellow and Silver Books	No	8.2	10.2	8.7
CIOB TCM	5.4	5.4	53.1	49
PPC2000	6.3	6.3	21.3	6.6
RIBA CBC/DBC	17	17	9.12	No

development project, where work to separate blocks is to be done at different times, all of which must be programmed well in advance of any work commencing.

Sometimes unexpected issues can arise and contracts that allow for flexibility can be helpful; for example, the ability to defer the start date at short notice without having to negotiate this with the contractor or the right to occupy parts of the building before the whole of the works are compete can be essential for larger projects, and contracts such as SBC16 allow for these situations. Table 3.8 summarises some of the key features of forms relating to timing, identifying the relevant clauses and other references.

The control and management of time during the project may also be important. Most JCT forms assume that the employer or contract administrator will not be involved with the order in which work is carried out, and there are few requirements regarding the provision or updating of a contractor's programme. Other forms, such as NEC4 and the CIOB contracts, place the programme at the heart of the contract and contain detailed provisions regarding responsibility, content, updating and management of the contract programme. Table 3.9 summarises aspects relating to monitoring in the various standard form contracts.

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Table 3.9: Monitoring progress

	Programme required	Programme updates required
JCT MW/MWD	No	N/A
JCT IC/ICD	No	N/A
JCT SBC	2.9.1	Only following extensions of time, 2.9.2
JCT MC	2.3.2, with consultant team	2.3.2, with consultant team
JCT CM/TC	2.8.1	Only following extensions of time, 2.8.2
JCT PCC	No	N/A
JCT CE	4.19	4.19
NEC4 ECC	31.1	32.2
NEC4 ECSC	31.1, if required in the scope	No
FIDIC Red, Yellow and Silver Books	8.3	8.3
CIOB TCM	37	40
PPC2000	6.2	Yes, if adjusted, 6.7
RIBA CBC/DBC	14.1, option	No

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Selecting a contract: quality

Ensuring that the contract accurately assigns design roles and liability for design is a key step in achieving the desired quality. Once the main contract is let, there are other mechanisms that can assist in managing quality, including monitoring any design development by the contractor, early identification of defective work, methods for remedying work and procedures at practical completion and afterwards. Table 3.10 summarises the features present in key standard form contracts.

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Contract administrator/ project manager approves programme and updates	Early warning of compensation events	Penalty for failure to warn	Time bar on claims
N/A	No	N/A	No
N/A	2.19.1, notification 'forthwith'	2.19.7 proviso	No
No	2.27.1, notification 'forthwith'	2.28.6 proviso	No
2.3.2, with consultant team	2.17.1, notification 'forthwith'	2.18.6 proviso	No
No	2.26.1, notification 'forthwith'	2.27.6 proviso	No
N/A	2.19.1, notification 'forthwith'	2.20.6 proviso	No
Client approves extensions, 4.19.2	5.9, if likely to occur	5.16, taken into account	No
31.3	15.1, 61.1	61.4, no adjustment	Yes
No	61.1	61.3, no adjustment	Yes
8.3, by engineer (employer in Silver Book)	8.4, 20.2.1	20.2.1, loses right	Yes
37.8, 40.5	43.1, if likely to occur	43.8, taken into account	No
6.2, by client	Yes, 3.7 and 18.4	18.3, loses right	No
No	3.2	3.3, taken into account	No

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Selecting a contract: cost

A key decision that clients need to make, where cost is a priority, is whether they are concerned with finding the lowest possible cost, or whether they want the most predictable cost – these are by no means the same thing. In general terms, the more detailed the information about the project available at tender stage, the more accurately and competitively it can be priced by the tendering contractor, and the less likely the cost is to change during the contract period. However, if the contract allows minimal or no opportunity to adjust the contract figure, any tendering contractor is likely to build in a considerable margin to cover unforeseen eventualities.

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Table 3.10: Monitoring quality

	Requirement for contractor's proposals to be submitted at tender	Drawing approval procedure included	Contractor quality management system requirement
JCT SBC	Eleventh recital	Schedule 1	No
JCT ICD	Sixth recital	Schedule 6	No
JCT MWD	No	Limited	No
JCT HO/B and HO/C & HO/CA	No	No	No
JCT DB	Second recital	Schedule 1	No
JCT MP	1	12	No
JCT CE	No	4.9	No
NEC4 ECC	No	21.2	40
FIDIC Red, Yellow and Silver Books	No	5.2 (4.4.1 in Red book)	4.9.1
CIOB TCM	No	15	No
PPC2000	Yes, the project proposals, developed in Stage 1	8, design developed by team and approved by client	16.3
RIBA CBC and DBC	No	15.2	No

There are ways to achieve competitively priced projects, even where the available information is limited at the start. In management arrangements, each package will be tendered separately, frequently with fully detailed information – this allows tight control over costs but, of course, as the packages are tendered sequentially, the only figures available at the start will be those in the project cost plan.

An increasingly common approach is to incentivise the parties to keep costs low. Partnering or alliancing contracts are often based on a target cost plan, with all members of the team sharing the savings should the target be undercut, and in some cases being penalised in the event that the target is exceeded.

Some of the more common types of pricing basis are outlined below, and summarised in Table 3.11.

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Tests required	Definition of practical completion	Defects limitation period extended after defect corrected
3.17	2.30, unclear	No
3.14	2.21, unclear	No
No specific provisions	No	No
No	No	No
3.12	2.27, unclear	No
22	Yes, reference to stipulated requirements	No
No	No	No
41	11.2	44.2
9	10.1	11.3
26	54	No
21.1	21.1, refers to partnering documents	No
5.5	9.10	No

Lump sum contracts

In a lump sum contract, the contractor undertakes to carry out a defined amount of work in return for an agreed sum. Normally, of course, if the client changes the quality or amount of work required, the agreed sum will be adjusted

The sum may be subject to limited fluctuations, usually to cover changes in tax, etc which were not foreseeable at the time of tendering. The sum may be subject to fluctuations in the cost of labour, plant and materials – the so-called 'full fluctuations' provisions. Recovery may be by use of a formula, or by the painstaking process of checking vouchers, invoices, etc.

Lump sum contracts 'with quantities' are priced on the basis of drawings and a firm bill of quantities. Items which cannot be accurately quantified can be covered by an approximate quantity or a provisional sum, but to minimise the risk of contract sum increases, these should be kept to a minimum.

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Lump sum contracts 'without quantities' are usually priced on the basis of drawings and clarifying information, which may be simply a descriptive specification, in which case the lump sum will not be itemised, or a detailed pricing schedule, in which the contract sum is the total of the priceable items. The job might be satisfactorily described by schedules of work, which break down the total work under broad headings, normally by trade but sometimes (eg for refurbishment work) by room. In either case, the itemised breakdown of the lump sum will be a useful basis for valuing any additional work. Where only a lump sum is tendered, then the tenderer will need to provide a supporting schedule of rates or contract sum analysis.

Measurement contracts

These are also sometimes referred to as 'remeasurement' contracts and are applicable to situations where the work which the contractor undertakes to do cannot, for some good reason, be accurately measured before tendering. The presumption is that it has been substantially designed and that a reasonably accurate picture of the amount and quality of work required is given to the tenderer. Probably the most effective measurement contracts, involving least risk to the client, are those based on drawings and bills of approximate quantities.

Measurement contracts can also be based on drawings and a schedule of rates or prices prepared by the client for the tenderer to complete. This type of contract might be appropriate where there is not enough time to prepare even approximate quantities, or where the quantity of work is very uncertain. Obviously, the client has to accept the risk involved in starting work with no accurate idea of the total cost, and generally this type of contract is best confined to small jobs.

A variant of this is the measured term contract, under which rates are established for categories of work or services, to apply for an agreed period of usually between one and three years. Instructions or orders will be required before any single job in the anticipated programme is carried out. The JCT MTC and the ACA Term Partnering Contract (TPC 2005) are examples of this type of contract.

Many framework arrangements are essentially a development of the measured term contract. To be appointed to the framework, the contractor or consultant will tender their rates for types of work and/or services, and when specific work is needed the contractor (or consultant) will submit a price for that work, based on the pre-agreed rates. For example, the JCT Framework Agreement establishes a system whereby, when the client issues an enquiry, the provider must tender using the pricing document that forms part of the framework agreement.

Cost reimbursement contracts

These are sometimes referred to as 'cost plus' or 'prime cost' contracts. The contractor undertakes to carry out an indeterminate amount of work on the basis that it is paid the prime or actual cost of labour, plant and materials. In addition, the

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contractor receives an agreed fee to cover management, overheads and profit. Checking the prime costs that are directly related to the works is relatively straightforward. The variable factors are the fee, which should be agreed beforehand, and establishing precisely what the fee covers. The basis of the fee can give rise to many variants of cost plus contracts. The specific form which is likely to be most appropriate will depend on the particular circumstances of the project.

Cost plus percentage fee

The fee charged is directly related to the prime cost. It is usually a flat rate percentage but it can also be on a sliding scale. However, under this arrangement the contractor has no real incentive to work at maximum efficiency, and this variant is only likely to be considered where requirements are particularly difficult to establish pre-contract.

Cost plus fixed fee

The fee to be charged is tendered by the contractor. This approach is appropriate provided that the amount and type of work is largely foreseeable. The contractor has an incentive to work efficiently so as to remain profitable within the agreed fee.

Table 3.11: Standard forms by pricing basis

Lump sum		**Measurement**	**Cost reimbursement**		
With quantities	**Without quantities**		**Cost plus**	**Target cost**	**Management (working to a cost plan)**
JCT SBC/Q	JCT SBC/XQ	JCT SBC/AQ	JCT PCC		
JCT IC/ICD	JCT IC/ICD				
	JCT MW/MWD				
JCT CM/TC	JCT DB	JCT MTC			JCT MC
JCT CE	JCT CE	JCT FA		JCT CE	
	NEC4 ECC: Option A	NEC4 ECC: Option B	NEC4 ECC: Option E	NEC4 ECC: Option C and D	NEC ECC: Option F
FIDIC Yellow and Silver Books		FIDIC Red Book		PPC 2000	
CIOB TCM	CIOB TCM	CIOB TCM	CIOB TCM	CIOB TCM	
RIBA CBC and DBC	RIBA CBC and DBC	RIBA CBC and DBC			

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Table 3.12: Cost monitoring provisions in standard forms

	Cost plan/priced document	Updates on total cost	Early warning of increases
JCT SBC/Q	Second recital, the contract bills	No	4.20.1 Loss/expense only
JCT ICD	Fifth recital, priced document	No	4.15.1 Loss/expense only
JCT MWD	No	No	No
JCT CE	Identified in Part 7 of the contract particulars	No, unless listed as a service	5.9, 5.11
JCT MP	Schedule 2, pricing document	No	26.1, 27.3
JCT DB	Second recital, the contract sum analysis	No	4.21.1 Loss/expense only
JCT HO/C & HO/CA	No	No	No
NEC4 ECC	Depends on main Option selected	Depends on main Option selected	15.1, 61.1
FIDIC Red Book	Bills of quantities or schedules	No	20.2.1
CIOB TCM	Bills of quantities or pricing document	61.1 (cost manager)	44.1
PPC2000	12, Price framework and agreed maximum price	8.7, 12.3	17, 18.4
RIBA CBC and DBC	Pricing document	No	3.2

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Cost plus fluctuating fee

The fee varies in proportion to the difference between the estimated cost and the actual prime cost. The presumption is that if the latter cost increases due to the contractor's supposed inefficiency, then the fee will be reduced accordingly. This approach depends on there being a realistic chance of ascertaining the amount and type of work at tender stage.

Cost reimbursement based on a target cost

This is a slight variant on the previous type of contract. The fee is related to an agreed target. The actual prime cost above or below the target affects the fee earned.

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Effect of failure to warn	Requirement to agree effect of variations in advance	Party determining value of payments and variations (if not agreed)
4.20.1, loses right	Schedule 2, option	Contract administrator
4.15.1, loses right	No	Contract administrator
N/A	No	Contract administrator
5.16, taken into account	No	Purchaser
None	26.3	Employer
4.21.1, loses right	Schedule 2: 2, option	Employer
N/A	No	Contract administrator
61.4, no adjustment	62	Project manager
20.2.1, loses right	13.3.2	Engineer
44.3, assessment delayed	32.2	Cost manager
18.3, loses right	17.2	Client representative
3.3, taken into account	5.11	Contract administrator

Guaranteed maximum price (GMP)

GMP contracts have been in existence for some time, appearing first around the same time as the design-build procurement method. Some standard form contracts, such as JCT CE, include an option for setting a GMP. However, GMP contracts are often let on an amended standard lump sum form, or on the client's or contractor's own terms. There is a variety of possible arrangements, but normally the contractor is compensated for actual cost incurred plus a fixed fee, subject to an agreed ceiling. Therefore, savings below a stipulated construction cost are passed on to the client (or in some cases shared) but the risk of any overrun is borne by the contractor. The exact extent of the risk assumed can only be determined by examining the terms of each contract. They frequently claim to pass all risks to the contractor but, in practice,

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many, particularly those drafted by contracting companies, contain clauses which allow for additional payment in limited or exceptional circumstances.

Table 3.11 summarises the forms that fall within each of the categories detailed above.

Further monitoring methods

Once the main contract is let, there are other mechanisms that can assist in monitoring the overall cost and minimising increases, such as the requirement for regular updates from the contractor on the total anticipated cost, early warning of possible events affecting cost and the option of agreeing the cost of changes in advance. It is also useful to establish, in the event that the parties fail to agree the value of a change, who will have the final say, subject of course to any challenge through dispute resolution mechanisms. Table 3.12 details the cost monitoring provisions in the standard forms, identifying the relevant clauses and other references.

References and further reading

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Which Contract?

Part 2



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Joint Contracts Tribunal

4

Since 1931, the Joint Contracts Tribunal (JCT) has produced standard forms of construction contract, guidance notes and other standard forms of documentation for use by the construction industry. The JCT became a limited company in 1998. Its seven member bodies represent the sectors of the industry that are the key participants (ie signatories) in the contract process. Today, the JCT provides a larger and more comprehensive range of contract documentation than any other contract-producing body in the UK construction industry. The JCT contracts can be used for a number of procurement routes, including design-bid-build (and 'with contractor's design'), design-build, design-build-operate and alliancing.

Standard Building Contracts 2016 (JCT SBC16)

Intermediate Building Contracts 2016 (JCT IC16)

Minor Works Building Contracts 2016 (JCT MW16)

Constructing Excellence Contract 2016 (JCT C16)

Major Project Construction Contract 2016 (JCT MP16)

Design and Build Contract 2016 (JCT DB16)

Management Building Contract 2016 (JCT MC16)

Construction Management Appointment 2016 (JCT CM/A16)

Measured Term Contract 2016 (JCT MTC16)

Prime Cost Building Contract 2016 (JCT PCC16)

Repair and Maintenance Contract (Commercial) 2016 (JCT RM16)

Building Contracts for a Home Owner/Occupier 2005 (revised 2015) (JCT HO/B05, HO/C05 & HO/CA05)

Framework Agreement 2016 (JCT FA16)

Pre-Construction Services Agreement (General Contractor) 2016 (JCT PCSA16)

Pre-Construction Services Agreement (Specialist) 2016 (JCT PCSA/SP16)

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JCT SBC16/Q, SBC16/XQ, SBC16/AQ

Joint Contracts Tribunal Ltd

Standard Building Contract With Quantities 2016 (SBC16/Q)

Standard Building Contract Without Quantities 2016 (SBC16/XQ)

Standard Building Contract With Approximate Quantities 2016 (SBC16/AQ)

These contracts are intended for large-scale projects and can be used by public and private sector clients. They are bilateral and require the employer to appoint a contract administrator. They all provide for the contractor to complete the design of identified parts (the 'Contractor's Designed Portion' or CDP) of the works – aside from the CDP, it is assumed that the contractor will be provided with all the detailed design information it needs to construct the works. These contracts all allow the employer to require the use of particular subcontractors through listing options or naming specialists. The key differences between the three versions relate to pricing and valuation. The 'with quantities' and 'without quantities' versions are both lump sum contracts; SBC16/Q requires a priced bill of quantities, whereas SBC16/XQ allows for a range of different priced documents. The 'with approximate quantities' version, SBC16/AQ, is a remeasurement form and requires a bill of approximate quantities. All include optional provisions to encourage collaborative working, such as a fair dealing clause, the use of negotiations and performance targets. They also include clauses relevant to public sector procurement, dealing with matters such as confidentiality, corruption and the use of building information modelling (BIM).

Background

The original agreed Standard Form was published in 1909 and was known as the RIBA Form. In many respects, the JCT Standard Building Contract 2016, available in three versions, is a direct descendant through a series of editions published in 1931, 1939, 1963, 1980, 1998, 2005 and 2011, although the publication is now the responsibility of the Joint Contracts Tribunal (JCT).

The 'with approximate quantities' version was first produced in 1979 in response to pressure from property developers. They wanted a traditional method of building procurement that allowed the earliest possible start on site. It was thought that this could best be achieved by describing work in accordance with the relevant measurement rules, even if the quantity of work could not be accurately determined.

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The 1980 editions (usually referred to as JCT80) were drafted to overcome various deficiencies in the 1963 edition, which had appeared over time, and in response to recommendations in the Banwell Report – in particular those relating to the treatment of subcontractors. At the time it was felt that JCT80 had struck a fair balance between the interests of the contracting parties and others involved. Initially, concern was expressed by some who saw the form as being much longer than its predecessor and more demanding to administer, yet it quickly became accepted as the form to be used for major building projects in the UK. Supplements were soon available to cater for contractor's design and sectional completion, together with documentation for nominating subcontractors and suppliers.

JCT80 was subject to 18 amendments, the last of which was an attempt to meet many of the recommendations in the Latham Report of 1994, and to ensure compliance with Part II of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) in respect of adjudication and payment provisions. The 1998 edition of the Standard Form was basically a consolidated version of JCT80, which subsequently received five amendments.

Since 1998 there have been three further editions of the form: SBC05, SBC11 and the current version, SBC16. SBC05 constituted a radical overhaul of the form, in format, layout, language and content. The provisions of the Sectional Completion Supplement and the Contractor's Designed Portion Supplement were incorporated in the form, as were the fluctuations provisions. The nominated subcontractor provisions and the performance specified work provisions were omitted. The form contained a new design documents submission procedure and provisions for third party rights and warranties. SBC11 primarily brought the contract up to date with the amendments made to the HGCRA.

The key 2016 changes can be summarised as follows:

- incorporation and updating of provisions from the JCT Public Sector Supplement
- changes relating to fair payment principles, transparency and building information modelling (BIM)
- amendments relating to the CDM Regulations 2015
- inclusion of references to various provisions of the Public Contracts Regulations 2015
- changes relating to payment, designed to reflect fair payment principles and to simplify and consolidate the payment provisions
- provision for monthly payments, including during the rectification period
- tightening up of the arrangements to secure provision of third party rights/warranties from subcontractors
- simplification and rationalisation of drafting in many areas; for example, calculation of amounts due and provisions for rectification following damage covered by insurance.

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Structure

Despite its length and complexity, the JCT Standard Building Contract (SBC16) is basically simple in its overall structure and logical in its layout, with the grouping of some material under schedules making it easier to navigate. The structure and layout are the same for all three versions.

SBC16 runs to over 110 pages. The articles of agreement include recitals, articles, contract particulars (to be completed by the parties) and an attestation. The numbering of recitals and articles may vary depending on the particular edition of SBC16, and if incorporating any separate amendments great care needs to be taken to achieve consistency.

The conditions are set out in nine sections. Section 1 deals with definitions and interpretation of the form. Section 2 sets out the contractor's general obligations, including its obligations with respect to programming, and the provisions for adjusting the completion date. Section 3 covers the control of the works, including the giving of instructions. Sections 4 and 5 deal with valuation and payment, section 6 with insurance, section 7 with assignment and third party rights, section 8 with termination and section 9 with dispute resolution.

Eight schedules are included at the back of the form: schedule 1, a design submission procedure; schedule 2, a variations and acceleration procedure; schedule 3, insurance options; schedule 4, a code of practice relating to testing; schedule 5, third party rights; schedule 6, forms of bonds; schedule 7, fluctuations; and schedule 8, supplemental provisions.

The supplemental provisions cover: collaborative working; health and safety (eg ensuring that this is treated as being of 'paramount concern' to all parties); cost saving and value improvement proposals by the contractor; sustainable development and environmental considerations; performance indicators and monitoring; notification and negotiation of disputes; transparency (the Freedom of Information Act 2000); compliance with the Public Contracts Regulations 2015; and named specialists (note this last provision is not included in the Minor Works Building Contract (MW16) or the Intermediate Building Contract (IC16)).

Use

The form is published in three versions for use with quantities, without quantities or with approximate quantities.

The 'with quantities' version (SBC16/Q) should only be used where the employer, through its professional consultants, has provided a full set of drawings and bills of quantities at the time of tender. An information release schedule is included in the documentation in an attempt to identify the party with responsibility for providing any further information which might be necessary to amplify the contract during the carrying out of the works.

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The 'without quantities' version (SBC16/XQ) also requires preparation of a full set of drawings, to be accompanied either by a specification or schedules of work. In order to give valuation of variations and fluctuations a substantive basis, the contractor is also required to submit a schedule of rates or a contract sum analysis and the level of detail required of the contractor is often stipulated at tender stage by the employer.

The 'approximate quantities' edition (SBC16/AQ) is for use in situations where the quality of work is defined precisely but the quantity cannot be, perhaps because of the nature of the work (eg it involves work to areas of an existing structure which cannot be accessed before start on site) or because there is insufficient time to prepare the detailed drawings necessary for accurate bills of quantities to be produced. The contract therefore uses an approximate bill of quantities to define the quality and quantity of the work, which will be subject to remeasurement.

All three versions incorporate sectional completion and a 'Contractor's Designed Portion' (CDP), both of which are optional provisions. The first allows for phased commencement and completion of the works, and for setting separate rates for liquidated damages for each section. The second allows for the contractor to design an identified part or parts of the works and includes a procedure for submitting the contractor's developing design information for comment. The parties should be careful to set out any requirements relating to scope, format and timing of such submissions in the contract particulars.

Where the CDP is used, the employer sets out its requirements at tender stage and, in response to the employer's requirements, the contractor is obliged to supply contractor's proposals and a CDP analysis for that part of the contract sum which relates to the CDP. The latter will assist in the valuation of variations.

The wide range of optional provisions, including the use of the alternative pricing mechanisms, the CDP, sectional completion and those set out in the schedules, particularly the supplemental provisions, ensure that the contract can be tailored to suit a wide variety of circumstances. For example, adopting the collaborative working provisions, coupled with a partnering charter, would help to ensure that the team works together in a cooperative manner. Selecting all the public sector clauses, and using those together with a framework agreement, would result in a contract that was well suited to public sector procurement.

SBC16 requires the appointment of a person to give effect to the various contract terms. The employer will usually appoint an architect or a contract administrator to this role, and such a person will be regarded as independent and impartial. SBC16 also provides for the employer to appoint an 'Employer's Representative' to act on behalf of the employer. A footnote in the contract emphasises the fundamental difference between these roles.

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Obviously, such a long and complex contract is not an easy read and its administration needs to be handled with great care. For example, the contract particulars require careful completion, including consideration of whether certain clauses apply or do not apply. Many of the clauses include not only legal conditions but also detailed procedures and rules. Some of these, especially those concerning payment or extensions of time, might appear to be arduous but they are intended to secure sound practice and should be followed meticulously.

Synopsis

1 Roles

- The Parties to the Contract are termed the Employer and the Contractor.
- The Contractor's main duty is to construct the Works as described in the Contract Documents (Article 1 and 2.1), including completing the design of any parts of the Works identified as Contractor Designed Portion (CDP) items (2.2).
- The Contractor must comply with all statutory obligations and give all required notices (2.1).
- Each Party undertakes to comply with the requirements of the CDM Regulations (3.23). The Architect/Contract Administrator is to act as Principal Designer and the Contractor as Principal Contractor unless the name of another person is inserted in the appropriate Article.
- The Contract makes provision for an Architect/Contract Administrator, who is identified in Article 3. The Architect/Contract Administrator's role includes issuing instructions, payment certificates, extensions of time and a practical completion certificate. The Employer must appoint an Architect/Contract Administrator to fulfil this role, and appoint a replacement within 21 days should the Architect/Contract Administrator cease to hold this post (3.5).
- The Contract also makes provision for a Quantity Surveyor, who is identified in Article 4, and whose role includes assessing the value of Variations, of Payment Certificates and of loss and/or expense claims. As with the Architect/Contract Administrator, the Employer must appoint a replacement should the Quantity Surveyor cease to act (3.5).
- The Employer may appoint an individual to act as its representative, by notifying the Contractor, and that representative will perform all the functions of the Employer, except as indicated in the notice (3.3).
- The Employer may appoint a clerk of works whose duty is solely to inspect under the direction of the Architect/Contract Administrator (3.4).
- Sub-contracting any part of the work, including any design, requires the Architect/Contract Administrator's written consent (3.7.1).

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- The Employer may require the Contractor to sub-contract parts of the Works to persons named in a list included in or annexed to the Contract Bills. There must be no fewer than three firms 'able and willing' to carry out the specified sub-contract work at the required time (3.8). The Contractor is fully responsible for these firms.
- Supplemental Provision 9 allows for the Employer to require the Contractor to use particular specialist firms to undertake identified parts of the Works, by means of naming the firms in the Contract Documents, or in an instruction relating to a Provisional Sum. They may not be used for CDP work (Schedule 8: 9.1) and, unlike the named sub-contractor provisions in IC16, there is no reference to them accepting any design responsibility.
- The Contractor is responsible for the performance of all sub-contractors, including listed sub-contractors and Named Specialists (3.7.1).
- There is a bar to assignment without written consent which refers to 'this Contract or any rights thereunder' (7.1).

2 Documents

- The Contract Documents are defined in clause 1.1, and the definition will depend on which version is used. In SBC16/Q and SBC16/XQ they comprise the Contract Drawings, the Contract Bills, the Agreement (which includes the Recitals, Articles and Contract Particulars), the Conditions, (where the CDP is used) the Employer's Requirements, the Contractor's Proposals and the CDP Analysis, and the BIM Protocol. For SBC16/XQ the Contract Bills are replaced by the 'Priced Document' or the specification.
- The Agreement and the Conditions are to be read as a whole, and nothing in any other Contract Document, or in any Framework Agreement, can override or modify the Agreement or Conditions (1.3).
- A list of definitions relevant to SBC16 is included (1.1). Rules for interpretation are set out, including a gender bias clause, and that a 'person' refers to an individual, firm, partnership, company and any other body corporate (1.4).
- Contract bills, except where specifically stated otherwise, must be prepared in accordance with the RICS *New Rules of Measurement: Detailed Measurement for Building Works* (NRM2) (2.13.1).
- The provisions for dealing with a discrepancy or divergence cover discrepancies within the Employer's Requirements and the Contractor's Proposals, but do not deal with discrepancies between those two documents (2.15 and 2.16).
- In the case of discrepancies in or divergences in or between documents, corrective instructions must be given (2.15).
- The Contractor is to notify the Architect/Contract Administrator if it finds any conflict between Statutory Requirements and the Contract Documents or any further

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information issued by the Architect/Contract Administrator (2.17.1). The Architect/Contract Administrator must issue an instruction and the Contractor is thereafter not liable to the Employer under the Contract for any non-compliance with Statutory Requirements resulting from the instruction (2.17.3).

- If divergences between Statutory Requirements and documents relating to the CDP are discovered, the Contractor is to propose the necessary amendments, which are to be at its own cost except where the conflict results from a change to Statutory Requirements since the Base Date (2.17.2).
- Except where the Contractor fails to notify a divergence of which it has become aware between the Contract Documents and Statutory Requirements as provided under clause 2.17, the Contractor shall not be liable for the contents of the Employer's Requirements or for verifying the adequacy of the design contained in them (2.13).
- Rights of third parties under the Contracts (Rights of Third Parties) Act 1999 are specifically excluded, except as provided for in the Contract (1.6).
- The Contract provides for third party rights to be conferred by the Contractor on purchasers/tenants and funders (7A and 7B), and by sub-contractors on purchasers/tenants and funders and/or the Employer (7E). The requirement to grant third party rights to identified persons, together with information regarding limits on liability, must be set out in a separate document (the Rights Particulars) referred to in the Contract Particulars (the JCT Standard Building Contract Guide (SBC/G) includes a Model Form for the Rights Particulars). The rights are set out in Schedule 5.
- The Contract provides options for collateral warranties to be provided by the Contractor to purchasers/tenants and funders (7C and 7D), and by sub-contractors to purchasers/tenants or funders and/or to the Employer (7E). The requirement to enter into warranties must be set out in the Rights Particulars and the relevant persons and sub-contractors identified, together with information regarding the limits to the Contractor's liability.
- The warranties provided by the Contractor to the purchaser/tenant and funder are to be on the JCT standard forms CWa/P&T and CWa/F (7C and 7D). The JCT also publishes SCWa/F, SCWa/P&T and SCWa/E for use in relation to sub-contractors, but their use must be required by the Parties under the Rights Particulars (7E).

3 Control: time

- Dates for possession and completion should be entered in the Contract Particulars (termed Date of Possession and Date for Completion, 1.1).
- There is provision for dividing the Works into Sections and setting separate commencement and completion dates and rates of liquidated damages for each Section. All provisions relating to timing, for example extending the date for completion, apply separately to each Section, except that there is only one Final Certificate.

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- There is an optional clause allowing for deferment of possession for a period not exceeding six weeks (2.5).
- The Contractor must commence work on the Date of Possession and proceed regularly and diligently and complete on or before the Completion Date (the Date for Completion as subsequently adjusted) (2.4). If the Contractor fails to complete by the Completion Date, liquidated damages are payable at the rate stated in the Contract (2.32).
- The Contractor must provide a master programme 'as soon as possible' after the Contract is executed (2.9.1.2).
- Notice of delay must be given in writing by the Contractor, as soon as it becomes apparent that progress is or is likely to be delayed, together with supporting information, including its estimate of the likely effect on completion (2.27.1). The Architect/Contract Administrator is required to consider a new Completion Date and to notify the Contractor of its decision as soon as reasonably practicable and within 12 weeks, or prior to the Completion Date if that is earlier (2.28.2).
- The interim decision is subject to review by the Architect/Contract Administrator no later than 12 weeks following practical completion (2.28.4 and 2.28.5). While it is possible to reduce extensions already awarded, the original contract period cannot be reduced (2.28.6.3), except by agreement through acceptance of a Variation Quotation, or an Acceleration Quotation (termed a Pre-agreed Adjustment, 2.26.2).
- 'Relevant Events' as listed in the Contract are the only grounds for an extension of time (2.29). These are either events caused by the Employer or those acting on its behalf or neutral events, such as exceptionally adverse weather.
- No extension of time is granted because of delays arising due to any matter involving design information to be provided by the Contractor (2.20).
- Where progress is disrupted because of the discovery of antiquities, the Contractor is obliged to inform the Architect/Contract Administrator and to take all necessary action to preserve the status quo and avoid disturbance (3.22.1). The Architect/Contract Administrator must issue instructions and the Contractor is entitled to ascertained loss and/or expense (3.22.2).
- Failure by the Contractor to complete within the contract period is certified as a fact by the Architect/Contract Administrator (2.31) and liquidated damages may be deducted or otherwise recovered by the Employer, provided the Employer gives the required notices in writing beforehand (2.32).
- Practical completion is certified by the Architect/Contract Administrator (2.30). Early completion is an option for the Contractor and, if achieved, issue of the Practical Completion Certificate cannot be delayed. Conversely, the Employer is not obliged to assist the Contractor in attempts to complete early.

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4 Control: quality

- The Contractor is obliged to carry out and complete the Works in accordance with the Contract Documents, the Construction Phase Plan and Statutory Requirements (2.1).
- The Contractor must complete the design of any CDP, and comply with all instructions of the Architect/Contract Administrator relating to the integration of the CDP with the rest of the Works (2.2).
- The Architect/Contract Administrator has power to issue directions to the Contractor to make certain that the Designed Portion can be integrated into the design of the Works as a whole (2.2.2).
- The Contractor's liability for design is limited to exercising reasonable care and skill (2.19.1). However, where the Contract is for housing work which is subject to the terms of the Defective Premises Act 1972, then this limit of liability might not apply (2.19.2), although certain limits are placed on the losses that may be recovered (2.19.3).
- Materials, goods and workmanship are to be to the standard set out in the bills, Employer's Requirements or Contractor's Proposals, as relevant. If stated to be to the Architect/Contract Administrator's satisfaction, they are to be to its reasonable satisfaction. Where no standard is set out, they are to be to a standard appropriate to the Works (2.3).
- Where the Contractor is of the opinion that an instruction issued by the Architect/Contract Administrator will affect the efficacy of the CDP, the Contractor is to notify the Architect/Contract Administrator within seven days of receipt of that instruction, specifying the injurious effect it might have. Such instruction shall be of no effect unless confirmed by the Architect/Contract Administrator (3.10.3).
- The Contractor is required to have a competent Site Manager on site at all material times (3.2) and to permit the presence of the Employer's clerk of works. The clerk of works is solely an inspector, although he or she can issue directions which require confirmation by the Architect/Contract Administrator (3.4).
- Access for the Architect/Contract Administrator is covered, but this may be subject to reasonable restrictions as far as workshops or other premises are concerned (3.1).
- The Architect/Contract Administrator has power to order the exclusion of persons from the Works (3.21).
- The Contract allows for work under the direct control of the Employer to be carried out during the time that the Contractor is in possession (2.7).
- Visits, inspections, etc by the Architect/Contract Administrator or clerk of works do not in any way diminish or affect the Contractor's responsibility to carry out the Works in accordance with the Contract Documents (3.6).

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- The Architect/Contract Administrator's instructions must be in writing, although this can mean written confirmation of oral instructions (3.12). The Contract clearly defines what instructions are empowered and these may include variations (3.14), postponement of work (3.15) and expenditure of Provisional Sums (3.16).
- Where work or materials do not comply with the Contract, the Architect/Contract Administrator can order their removal from the Site (3.18.1). Where, after consultation, it is agreed that non-conforming work should remain (3.18.2), then the Employer is entitled to an appropriate deduction. The Architect/Contract Administrator is empowered to order tests and inspection, and the likelihood of any non-compliance in similar work elsewhere is covered (3.18.4 and Schedule 4).
- The Contractor must be provided with the information referred to in the Information Release Schedule by the stated times (2.11). The Contractor must also be provided with such further drawings or details as are reasonably necessary (2.12). The Contractor must keep on site copies of all documents issued (2.8.3).
- The Contractor is required to submit drawings and other documents it prepares in relation to the design (the 'Contractor's Design Documents'), as set out in the Contract Documents or as reasonably necessary. The submission is to follow a procedure set out in Schedule 1 (2.9.4 and 2.9.5).
- The Architect/Contract Administrator is to respond by returning the design documents marked either 'A', 'B' or 'C' within 14 days of the receipt of the Contractor's Design Documents or (if later) within 14 days from either the date or expiry of the period for submission of such designs stated in the Contract. The Contractor is to execute work marked 'A' or 'B'; in the case of the latter it must incorporate comments by the Employer. The Contractor must either revise and resubmit all design documents marked 'C' or notify the Architect/Contract Administrator that it disagrees with the comments (Schedule 1: 5.3). The Architect/Contract Administrator must then either withdraw or confirm the comments; if confirmed, the Contractor must amend and resubmit the documents (Schedule 1: 7).
- Where the Architect/Contract Administrator fails to respond in time, it shall be regarded that the document has been marked 'A' (Schedule 1: 3). However, neither compliance with the submission procedure nor carrying out the Architect/Contract Administrator's instructions relieves the Contractor of its duty to ensure that the CDP complies with the Contract (Schedule 1: 8.3).
- The Contract requires all work to be carried out in a proper and workmanlike manner, and in accordance with the Construction Phase Plan (2.1). In the event of failure to comply, and although this might under other circumstances be interference with the Contractor's working methods, the Architect/Contract Administrator is empowered to issue instructions (3.19).
- After Practical Completion, the Contractor is obliged to rectify defects (2.38) unless the Employer decides otherwise and agrees an appropriate deduction instead.

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5 Control: cost

- SBC16/Q and SBC16/XQ refer to the Contract Sum, whereas SBC16/AQ refers to the Ascertained Final Sum (assessed by remeasuring all work). In both cases the sum is VAT exclusive (4.5) and may only be adjusted as provided for in the Conditions (4.2).
- The Conditions offer three alternatives for adjusting the sum due to changes in market conditions (Fluctuations): increases in taxes, including landfill tax, levies or contributions promulgated after the date of tender (Option A, Schedule 7); increases in the cost of labour and materials assessed as a net increase (Option B, now downloadable from the JCT website); or in accordance with Formula Rules (Option C, also downloadable, but not applicable to SBC16/AQ). The preferred option is selected in the Contract Particulars; if none is selected then Option A applies.
- Where provisional sums have been included, instructions must be given to the Contractor (3.16). The valuation of work carried out where an approximate quantity is included (for SBC16/AQ this is all work), or where provisional sums are included, or where a variation has been ordered, is to be by agreement or by the Quantity Surveyor's application of the Valuation Rules (5.2.1).
- In addition, the Contractor may be invited to submit a 'Variation Quotation' for work which is the subject of an Architect/Contract Administrator's instruction (5.3). Such a quotation, if accepted, would bind the Contractor to the direct cost of work, the time implications and any loss and/or expense which might apply. The work would not be carried out on this basis unless a Confirmed Acceptance was issued (Schedule 2: 1.3). In the event that the quotation is not accepted, an instruction may still be issued to proceed with the work, but it will then be subject to the valuation rules and procedures (5.6.1). If the Variation Quotation is not accepted, the Contractor is paid a fair amount for the cost of its preparation (Schedule 2: 5.2).
- If the Architect/Contract Administrator issues a Variation on work which is part of the CDP, then this is a modification of the Employer's Requirements and will be valued as such (3.14.3).
- The Contractor is empowered to carry out limited work for emergency compliance with Statutory Requirements and this will be treated as a Variation to be valued accordingly (2.18).
- The Contractor must make written application for reimbursement of loss and/or expense. The grounds for any valid application are set out (4.20.1) and include only matters over which the Contractor has no control and which occur because of action or failure by the Employer. The procedures should be followed precisely, and the Contractor's proper written notice and supporting information is a requirement (4.21). Other rights at common law are preserved (4.24).
- SBC16 allows for advance payment of the Contractor (4.7, an entry is required in the Contract Particulars) and this might be subject to an Advance Payment Bond (Part 1,

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Schedule 6). The sum is to be reimbursed to the Employer in agreed amounts and at agreed times.

- Interim payments are made to the Contractor following the issue of an Interim Certificate by the Architect/Contract Administrator or, if no certificate is issued, following the issue of a Payment Notice by the Contractor.
- The due dates for interim payment are seven days after the Interim Valuation Date stated in the Contract Particulars (4.8).
- Interim valuations will be made by the Quantity Surveyor (4.9.2). However, the Contractor may, not later than the valuation date, make a Payment Application to the Quantity Surveyor, stating the sum it considers due at the relevant due date and the basis on which the sum was calculated (4.10.1).
- Not later than five days after each due date, the Architect/Contract Administrator shall issue an Interim Certificate stating the sum that it considers to be due to the Contractor on the due date and the basis for its calculation (4.9.1).
- The Interim Certificate is to be prepared in accordance with clauses 4.14 and 4.15 and should include any amount deducted as retention, cumulative total of any advance payments that have become due for reimbursement in accordance with the Contract Particulars, sums stated in previous Interim Certificates and any sums paid in respect of Payment Notices.
- The final date for payment of each Interim Certificate is 14 days from its due date (4.11.1). The sum to be paid, subject to any Pay Less Notice, shall be the sum stated on the Interim Certificate (4.11.2).
- Where an Interim Certificate has not been issued in accordance with the Contract, and if an application for payment has been made by the Contractor in accordance with clause 4.10.1, the application for payment shall become a Payment Notice and the Employer, unless it issues a valid Pay Less Notice, will be liable to pay the sums stated on such Payment Notice (4.10.2).
- Where the Contractor has not made a payment application, it may, at any time after the last date for issuance of an Interim Certificate, give a Payment Notice to the Quantity Surveyor, stating the sum the Contractor believes is due on the relevant payment due date and the basis of the calculation (4.10.2.2). In such circumstances, the final date for payment is postponed by the same number of days as the number of days after the expiry of the last date for issue of the Payment Certificate that the Payment Notice was issued (4.11.4).
- Where the Employer intends to pay less than the amount stated in the Payment Certificate or the Payment Notice, it shall not later than five days before the final date for payment issue a Pay Less Notice, stating the amount it considers due and the basis for the calculation (4.11.5.1).

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- Failure to pay by the final date for payment will attract simple interest of 5 per cent over current base rate (4.11.6 and 1.1) and can give the Contractor a right to suspend performance of some or all of its obligations with a right to recover reasonable costs and expenses incurred as a result of such suspension. Suspension is to be preceded by the service of a seven-day notice and may only progress where there is a failure to remedy the non-payment after the seven-day period (4.13).
- Retention is applied to all Interim Certificates (4.19), unless the alternative of the Contractor providing a bond in lieu of Retention is selected (4.18). Half the retention amount will be released at practical completion (4.19.2).
- There are precise procedures to be followed in the preparation of the final account after practical completion (4.25 and 4.26). Issue of the Final Certificate is within two months of the last occurring of: the end of the Rectification Period, the date of issue of the Certificate of Making Good, or the date of sending the final statement and final ascertainment of loss and expense (4.26.1). The due date for final payment is the date of issue of the certificate, or the expiry of the two-month period (4.26.3). Similar rules to those outlined above for Interim Certificates apply to the Final Certificate with regard to notices, except that the certificate may show a balance due to the Employer, in which case the Contractor has the right to issue a Pay Less Notice (4.11.5.2).
- The Final Certificate is only conclusive of certain matters as set out in clause 1.9, and is not conclusive that the Works have been carried out in accordance with the Contract (1.9.1.1).

6 Insurance

- The Contractor indemnifies the Employer in respect of personal injury or death (6.1) and injury or damage to property other than the actual Works (6.2). This is to be backed by insurance (6.4) and the minimum amount of cover required is entered in the Contract Particulars.
- If instructed, the Contractor is to take out joint names insurance for the Employer against the risk of claims arising due to collapse, vibrations, lowering of water level, etc (equivalent to the tort of nuisance). There is a list of exceptions and damage must not be attributable to any negligence by the Contractor. An entry in the Contract Particulars will indicate whether cover may be required (6.5) and the amount of cover to be provided.
- Insurance of the Works is for 'all risks' where new buildings are concerned and should be for full reinstatement value. It can be taken out either by the Contractor (Schedule 3, Option A) or by the Employer (Schedule 3, Option B). In both cases the insurance is to be in joint names.
- Insurance of existing structures and the contents is a matter for the Employer (Schedule 3, Option C) and is limited to Specified Perils. New work in existing

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buildings, although still a matter for the Employer, requires all risks cover. As an alternative, the Parties may set out their own requirements for insurance in relation to work to existing buildings (a C.1 Replacement Schedule).

- Where the Contract includes a CDP element, the Contractor is required to carry professional indemnity insurance to cover its liability for design, details of which should be set out in the Contract Particulars.
- An entry in the Contract Particulars will show whether the Joint Code of Practice on Fire Prevention on Construction Sites is to apply (6.18) and, if so, both Employer and Contractor must comply with it. In the event of non-compliance, the insurers can specify remedial measures, which must be undertaken.
- In the event that terrorism cover is withdrawn and is no longer available, the situation and options open to the Employer are dealt with in clause 6.11, as applicable.
- It is expected that where any act of terrorism has not been adequately covered under existing insurance policies, the party indicated as responsible for maintaining such policies shall from time to time take out and maintain the appropriate insurance cover for terrorism. The Contract points to Pool Re Cover, or similar successive schemes, as appropriate avenues for obtaining such polices.

7 Termination

- The Employer is allowed to terminate the employment of the Contractor by reason of specified defaults (8.4). A warning notice may be issued by the Architect/Contract Administrator, but the notice of termination is a matter for the Employer. In the case of insolvency of the Contractor, depending on the circumstances, the Employer might enter into an agreement with the Contractor for continuation or novation. If no such agreement is reached, and in all other cases, the Employer may have the Works completed by another contractor (8.7) or decide not to have the Works carried out and completed at all after termination of the Contractor's employment (8.8).
- The Contractor is allowed to terminate its own employment for specified defaults by the Employer (8.9). Again, the procedures must be followed meticulously. In the event of insolvency of the Employer, the Contractor may elect to terminate its own employment.
- Either Party can terminate the employment of the Contractor for listed neutral causes, including grounds set out in regulations 73(1)(a) and 73(1)(c) of the Public Contracts Regulations 2015 (8.11).
- The respective rights and duties of the Parties concerning payment, removal and completion are set out (8.7 or 8.12).

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8 Dispute avoidance and resolution

- A collaborative working clause (Supplemental Provision 1) may be incorporated that requires both Parties to work with each other and the project team in a cooperative and collaborative manner, in good faith and in a spirit of mutual trust and respect.
- If Supplemental Provision 6 is incorporated, each Party should notify the other promptly of any matter that is likely to give rise to a dispute, and the nominated senior executives are required to meet to try to resolve it.
- Once a dispute arises, subject to the right of either Party to refer any matter at any time to adjudication, mediation is suggested by the Contract as an appropriate first instance dispute resolution method (9.1).
- Part II of the HGCRA gives either Party a statutory right to refer any difference or dispute arising out of the Contract to adjudication. Article 7 of SBC16 provides for this.
- The procedure for adjudication is as set out in the Scheme for Construction Contracts (England and Wales) Regulations 1998, subject to some limited provisions regarding the appointment of the Adjudicator (9.2). The Adjudicator's decision is binding on the Parties, at least until the dispute is finally determined at arbitration or by legal proceedings.
- Article 8 establishes arbitration as an agreed method for final resolution of disputes, provided the Contract Particulars indicate that Article 8 and clauses 9.3 to 9.8 are to apply. Unless these provisions are shown to apply, then disputes are to be referred for legal proceedings (Article 9).
- The appointment of the Arbitrator is subject to an entry in the Contract Particulars, and his or her powers are defined (9.5). The Parties agree that either may apply to the courts on a question of law (9.7).
- Arbitration is to be conducted in accordance with the JCT 2016 edition of the Construction Industry Model Arbitration Rules (9.3) and the provisions of the Arbitration Act 1996 shall apply (9.8).

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This contract?

If considering using SBC16, the following points should be borne in mind.

It is a complex and sophisticated contract with many optional provisions and is intended for substantial projects. There are three versions: two for use as lump sum contracts, with or without quantities, and one as a measurement form. In all cases, the employer is required to appoint a contract administrator and a quantity surveyor.

Work needs to be fully documented at tender stage and to be completed within a stated period. The contractor may be required to design an identified part of the works, in which case it must be provided with detailed employer's requirements at tender stage. Otherwise, the contractor is to be provided with fully detailed design information, ideally prior to the contract being entered into, as any information provided later may give rise to claims.

The contract can include partial possession and sectional completion. The completion date may be subject to adjustment if delays are caused by a range of 'neutral events', as well as by events which are the responsibility of the employer.

It allows for subcontractors to be chosen by the contractor from a list of not fewer than three names, and also for the employer to name specialists to undertake specific work, other than the CDP.

When completing the form, entries are required relating to decisions on matters including which supplemental provisions will apply, deferment of possession, named specialists, bonds (whether in lieu of retention or relating to advance payment or 'listed items'), insurance of the works, Joint Fire Code, liquidated damages, advance payment, fluctuations and dispute resolution.

If acting as contract administrator, note that SBC16 requires a comprehensive understanding of its procedural rules, many of which are detailed and likely to prove time consuming.

SBC16 places more risk on the employer than some other standard forms, such as JCT MP16 or GC/Works/1. The sometimes lengthy provisions are not always easy to grasp, although recent editions have gone a long way towards improving its clarity and ease of use. The form is supported by a considerable body of case law and many helpful commentaries and guides. It is still probably the most widely used form for major building work.

If used for work in Northern Ireland, an Adaptation Schedule should be incorporated while, for work in Scotland, the Scottish Building Contract Committee (SBCC) version of the form should be used.

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References and further reading

JCT Standard Building Contract With Quantities 2016
JCT Standard Building Contract Without Quantities 2016
JCT Standard Building Contract With Approximate Quantities 2016
JCT Standard Building Sub-Contract Agreement 2016
JCT Standard Building Sub-Contract Conditions 2016
JCT Standard Building Sub-Contract with sub-contractor's design Agreement 2016
JCT Standard Building Sub-Contract with sub-contractor's design Conditions 2016
JCT Contractor Collateral Warranty for a Funder 2016
JCT Contractor Collateral Warranty for a Purchaser or Tenant 2016
JCT Sub-Contractor Collateral Warranty for a Funder 2016
JCT Sub-Contractor Collateral Warranty for a Purchaser or Tenant 2016
JCT Sub-Contractor Collateral Warranty for the Employer 2016

JCT Standard Building Contract Guide 2016
JCT Standard Building Sub-Contract Guide 2016
JCT Practice Note: *Deciding on the Appropriate JCT Form of Contract* (2016)

Lupton, S. *Guide to JCT Standard Building Contract 2016*, London: RIBA Publishing (2017)
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JCT IC16 and ICD16

Joint Contracts Tribunal Ltd

Intermediate Building Contract 2016 (IC16)

Intermediate Building Contract with contractor's design 2016 (ICD16)

These contracts are intended for medium-scale projects of a reasonably complex nature and can be used by public and private sector clients. They are bilateral and both require the employer to appoint a contract administrator. The key difference between the two versions is that ICD16 allows for the contractor to complete the design of identified parts (the 'Contractor's Designed Portion', or CDP) whereas IC16 does not. In all other respects, the contracts are identical. A key distinguishing feature of both versions is the ability for the employer to require that specific work is let to named subcontractors, who may be selected either before or after the contract is let and who may be required to design the work packages they provide. Both versions are lump sum contracts and allow for a range of different pricing arrangements and contract document packages. They include clauses relevant to public sector procurement, dealing with matters such as performance targets, confidentiality and corruption.

Background

With the introduction of a then new and more sophisticated edition of the Standard Form of Building Contract (JCT80), many architects felt that they lacked a contract suitable for middle range jobs. The RIBA raised this concern and, in October 1981, the JCT set up a working party to prepare an 'intermediate' form. Following considerable input from constituent bodies, in particular the RIBA, the Association of District Councils and the Association of Metropolitan Authorities, the Intermediate Form (IFC84) appeared in September 1984.

IFC84 was the subject of 12 amendments, the last of which was to meet many of the recommendations made in the Latham Report of 1994. Incorporation of Amendment 12 ensured compliance with Part II of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) in respect of adjudication and payment provisions.

The development of this form continued with the publication of the 1998 edition, which consolidated the various amendments to IFC84. Further refinement was undertaken in the 2005 edition, which was released in two versions, one with aspects of the design to be undertaken by the contractor and one where the contractor's responsibilities did not include design. The 2005 edition incorporated many significant changes while retaining popular provisions, such as naming subcontractors.

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JCT IC16 and ICD16

The 2011 edition was published primarily in response to the amendment of the HGCRA by the Local Democracy, Economic Development and Construction Act 2009 (LDEDCA), which came into force on different dates throughout Great Britain and Northern Ireland, starting on 1 October 2011 in England and Wales. The changes in this edition concentrate on the payment provisions, payment certificates, definition of insolvency and an update of drafting concerning terrorism cover.

The key 2016 changes can be summarised as follows:

- incorporation and updating of provisions from the JCT Public Sector Supplement
- changes relating to fair payment principles, transparency and building information modelling (BIM)
- amendments relating to the CDM Regulations 2015
- inclusion of references to various provisions of the Public Contracts Regulations 2015
- changes relating to payment, designed to reflect fair payment principles and to simplify and consolidate the payment provisions
- provision for monthly payments, including during the rectification period
- addition of a procedure for submission of contractor's design documents (Schedule 6, ICD16 only)
- tightening up of the arrangements to secure provision of third party rights/warranties from subcontractors
- simplification and rationalisation of drafting in many areas; for example, calculation of amounts due and provisions for rectification following damage covered by insurance.

Structure

The Intermediate Building Contract continues to be published in two versions: one 'with contractor's design', which has provision for the contractor to design an identified portion of the works (ICD16), and one which does not (IC16). In all other respects the versions are identical, therefore the points raised below can be assumed to apply to both versions, unless indicated otherwise.

Both versions of the form now run to over 90 pages. There are ten recitals in the ICD16 version and nine articles. The conditions are arranged under nine headings, in line with SBC16. There is a contents list at the front which gives clause and page numbers. Contract particulars (to be completed by the parties) are also included at the front, and the conditions are followed by six schedules dealing with insurance options, named subcontractors, forms of bonds (in relation to advance payment and off-site materials and goods), fluctuations, supplemental provisions and a design submission procedure.

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JCT IC16 and ICD16

The supplemental provisions cover: collaborative working; health and safety (eg ensuring this is treated as being of 'paramount concern' to all parties); cost saving and value improvement proposals by the contractor; sustainable development and environmental considerations; performance indicators and monitoring; notification and negotiation of disputes; transparency (the Freedom of Information Act 2000); and compliance with the Public Contracts Regulations 2015.

Use

The Intermediate Building Contract has the virtue of relative brevity, a clear layout and commendably easy cross-referencing. The conditions should be adequate for the foreseeable circumstances of most middle range projects. The reference to a framework agreement in the recitals and inclusion of the fair payment and optional supplemental provisions (which are the same as those included in SBC16) make it suitable for public sector work.

The inside front cover of IC16 lists three criteria for suitability. These refer to building works of simple content and without complex services installations, where the works are designed by or on behalf of the employer and the employer is to provide the contractor with drawings, specifications and schedules that define the quantity and quality of work and, finally, where the employer intends to engage an architect/contract administrator and a quantity surveyor to administer the contract. ICD16 lists an additional criterion for suitability: ie that the form is suitable where the contractor is to design a discrete part or parts of the works and the requirements for that design have been detailed by or on behalf of the employer.

The ability to name subcontractors to undertake specific packages of work, including associated design if required (a feature not included in SBC16), is likely to be a key reason for selecting this form. Although the guidance note states that it is intended for works 'of simple content' and 'without building service installations of a complex nature', the naming provisions, particularly if used alongside the CDP, allow for a sophisticated range of options that can tap into the design expertise of both specialist subcontractors and the main contractor. It would therefore be a good choice where such input is needed, while still leaving the overall control of design with the employer's consultants. However, this would not be the case where numerous parts or very significant aspects are to be designed by the contractor, and the guidance note states clearly that it is not suitable for design-build procurement.

Both versions are for lump sum contracts. The fourth recital (fifth in ICD16) allows the contractor to tender either by pricing the itemised bills, specification or schedules (Option A), or simply to state a lump sum based on a specification which is not itemised for pricing (Option B). If the latter option is selected, then the employer will require the contractor to submit a schedule of rates or a contract sum analysis. The employer might be wise to stipulate a contract sum analysis option. The employer might also require it to be in a preferred format, and perhaps this should be prepared by the quantity surveyor for completion by the tenderers.

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JCT IC16 and ICD16

There is a provision for sectional completion and, if partial possession before practical completion is required, then clause 2.25 provides for this. However, there is no requirement for the contractor to provide a programme or updates on progress on a regular basis. Therefore, if timing aspects are critical, then additional provisions would be required or another form should be considered.

Synopsis

1 Roles

- The Parties to the Contract are the Employer and the Contractor.
- The Contractor's primary obligation is to carry out and complete the Works described in the Contract Documents (Article 1 and 2.1), and under ICD16 it may also be required to design identified parts (the 'Contractor's Designed Portion', or CDP) (2.1.1).
- The Contractor must comply with all statutory obligations and give all required notices (2.1). Each Party undertakes to the other that it will comply with the requirements of the CDM Regulations (3.18).
- An Architect/Contract Administrator is identified under Article 3 and a Quantity Surveyor under Article 4; the Employer is required to appoint these, and to replace them within 14 days if they cease to act (3.4). The Contractor may object to a proposed replacement and, if the reasons are considered acceptable by a person appointed under the Contract's dispute resolution methods, the Employer must appoint another firm, but otherwise the Contractor must accept the authority of the first replacement (3.4). The right of objection does not apply where the Employer is a local authority and the replacement is an official of that body.
- The Architect/Contract Administrator is given a range of powers and duties, including issuing Payment Certificates, awarding extensions of time and providing further information to the Contractor. The Quantity Surveyor's role is to assist with preparing valuations of amounts to be certified and assign the effect of changes, including loss/and or expense amounts.
- The Architect/Contract Administrator is the Principal Designer and the Contractor is the Principal Contractor for the purposes of the CDM Regulations 2015, unless other firms are named in Articles 5 and 6.
- The Employer may appoint a clerk of works whose role is to act as inspector under the direction of the Architect/Contract Administrator, and who has no authority to issue instructions to the Contractor (3.3).
- The Contractor is required to have a competent person-in-charge on site at all reasonable times (3.2).
- The Contractor may sub-contract the Works, including any design, but only with the consent of the Architect/Contract Administrator. The Contractor remains entirely

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JCT IC16 and ICD16

responsible for any work it sub-contracts, including any design responsibilities, save in the case of Named Sub-Contractors (3.5).

- The Employer may require the Contractor to sub-contract the work to Named Sub-Contractors, by means of naming them in the Contract Documents, or in an instruction relating to a provisional sum (3.7). In either case, the Contractor is not responsible for any design work carried out by the Named Sub-Contractor (Schedule 2: 11), but is otherwise fully responsible for their performance.
- Neither the Employer nor the Contractor may assign the Contract, or any rights under the Contract, without the other's consent (7.1).

2 Documents

- The Contract Documents are defined in clause 1.1 as the Agreement (which includes the Recitals, Articles and Contract Particulars), the Conditions, the Contract Drawings, the Priced Document or Specification (depending on which pricing option is selected), the BIM Protocol and, where Named Sub-Contractors are used, the related invitations to tender and tenders.
- In the case of ICD16, the definition of Contract Documents also includes the Employer's Requirements and Contractor's Proposals for the CDP (Article 2 and clause 1.1).
- The Agreement and the Conditions are to be read as a whole, and nothing in any other Contract Document, or in any Framework Agreement, can override or modify the Agreement or Conditions (1.3).
- A list of definitions relevant to IC16 is included (1.1). The Contract Documents are to be read as a whole and the Agreement and Conditions have priority (1.3).
- Rules for interpretation are set out, including a gender bias clause, and that a 'person' refers to an individual, firm, partnership, company and any other body corporate (1.4).
- In the case of inconsistencies or errors in or between documents (including the tender particulars for a Named Sub-Contractor), corrective instructions must be given (2.13.1).
- The Contractor is to notify the Architect/Contract Administrator if it finds any conflict between Statutory Requirements and the Contract Documents (2.15.1). The Architect/Contract Administrator must issue an instruction (2.15.2). The Contractor is not liable for any non-compliance if it results from having carried out work in accordance with the Contract Documents or any instruction (2.15.3).
- Contract Bills, except where specifically stated otherwise, must be prepared in accordance with the RICS *New Rules of Measurement: Detailed Measurement for Building Works* (NRM2) (2.12.1).

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- The Contractor is encouraged to engage sub-contractors (except for Named Sub-Contractors) on the relevant JCT Intermediate Building Sub-Contract, and in any event must include certain provisions in any sub-contract as set out in clause 3.6. These include property vesting clauses, intended to protect the Employer in circumstances where it has paid for materials and goods under a certificate, but the Contractor becomes insolvent prior to paying the relevant sub-contractor for these. There are also provisions relating to termination, CDM, interest for late payment and sub-contractor warranties (the warranties may be particularly important where the Contractor sub-contracts CDP work).
- In the case of Named Sub-Contractors, the Contractor must engage them using the JCT Intermediate Named Sub-Contract documents (3.7). The Contractor must also arrange for the sub-contractor to enter into a warranty with the Employer using the JCT Intermediate Named Sub-Contractor/Employer Agreement (ICSub/NAM/E).
- Rights of third parties under the Contracts (Rights of Third Parties) Act 1999 are specifically excluded, except as provided for in the Contract (1.6).
- The Contractor may be required to provide warranties to funders or purchasers and tenants on the JCT standard forms (7.6 and 7.7). If required under the Contract Particulars, the Contractor must also arrange for sub-contractors to enter into warranties with a funder, purchaser or tenant, or with the Employer (7.8).
- As an alternative to warranties, the Contractor may be required to grant third party rights to funders or purchasers and tenants (7.3).
- The Contract includes two forms of bonds in Schedule 3: an Advance Payment Bond and a bond in respect of payment for off-site materials and/or goods.

3 Control: time

- Dates for possession and completion must be entered in the Contract Particulars (termed Date of Possession and Date for Completion, 1.1).
- There is provision for dividing the Works into Sections, and setting separate commencement and completion dates, and rates of liquidated damages for each Section. All provisions relating to timing, for example extending the date for completion, apply separately to each Section, except that there is only one Final Certificate.
- There is an optional clause allowing for deferment of possession for a period not exceeding six weeks (2.5).
- The Contractor must commence work on the Date of Possession and proceed regularly and diligently and complete on or before the Completion Date (the Date for Completion as subsequently adjusted) (2.4). If the Contractor fails to complete by the Completion Date, liquidated damages are payable at the rate stated in the Contract (2.23).

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- There is no reference to a contractor's programme. If one is required, provisions would need to be added to the Contract.
- Notice of delay must be given in writing by the Contractor as soon as the Works (or any Section) appears likely to be delayed. The Contractor must supply any information reasonably necessary to assess whether an extension of time is due (2.19.4.2). The Architect/Contract Administrator is to consider whether progress has been delayed by a Relevant Event, and to notify the Contractor of its decision, in writing, as soon as it is able to see the effect on completion (2.19.1). Although no time limit is stated, this must be within a reasonable time. Relevant Events are listed, for which the Architect/Contract Administrator is empowered to make an extension (2.20). Review of extensions up to 12 weeks beyond practical completion is discretionary (2.19.3).
- If the Contractor fails to meet a Completion Date, this fact must be certified (2.22). Liquidated damages may be deducted or otherwise recovered by the Employer, provided the Employer gives the required notices in writing beforehand (2.23.1).
- Practical completion is certified by the Architect/Contract Administrator (2.21).
- The Contractor is obliged to rectify defects (2.30) unless the Employer decides otherwise and takes an appropriate deduction instead.
- There is provision for partial possession (2.25).
- Where the Employer wishes to occupy part of the uncompleted Works for storage, etc, this is possible subject to proper insurance arrangements (2.6).

4 Control: quality

- The Contractor is obliged to carry out and complete the Works in accordance with the Contract Documents, the Construction Phase Plan and Statutory Requirements (2.1).
- The Contractor must complete the design of the Contractor's Designed Portion and comply with all instructions of the Architect/Contract Administrator relating to the integration of the CDP with the rest of the Works (2.1, ICD16 only).
- The Architect/Contract Administrator has power to issue directions to the Contractor to make certain that the CDP can be integrated into the design of the Works as a whole (2.1.2, ICD16 only).
- In ICD16, the Contractor's liability for design is limited to exercising reasonable care and skill (2.34.1). However, where the Contract is for housing work which is subject to the terms of the Defective Premises Act 1972, then this limit of liability might not apply (2.34.2), although certain limits are placed on the losses that may be recovered (2.34.3).

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- The Contractor is not responsible for the Employer's Requirements or the adequacy of any design contained within them (2.34.4).
- Materials, goods and workmanship are to be to the standard set out in the Contract Documents (2.1 and 4.1), including the Employer's Requirements or Contractor's Proposals as relevant. If stated to be to the Architect/Contract Administrator's satisfaction, they are to be to its reasonable satisfaction. Where no standard is set out, they are to be of a standard appropriate to the Works (2.2).
- If applicable, the Contractor must be provided with the information referred to in the Information Release Schedule by the stated times (Third/Fourth Recital and clause 2.10). The Contractor must also be issued with further drawings as reasonably necessary to complete the Works (2.11). Use of them is limited and confidentiality of rates is to be respected (2.8.3).
- The Contractor is required to submit drawings and other documents it prepares in relation to the design (the 'Contractor's Design Documents'), as set out in the Contract Documents or as reasonably necessary (2.10.2, ICD only). The submission is to follow a procedure set out in Schedule 6 (2.10.3, ICD only).
- The Architect/Contract Administrator is to respond by returning the design documents marked either 'A', 'B' or 'C' within 14 days of the receipt of the Contractor's Design Documents or (if later) within 14 days from either the date or expiry of the period for submission of such designs stated in the Contract. The Contractor is to execute work marked 'A' or 'B'; in the case of the latter it must incorporate comments by the Employer.
- The Contractor must either revise and resubmit all design documents marked 'C' or notify the Architect/Contract Administrator that it disagrees with the comments (Schedule 6: 5.3). The Architect/Contract Administrator must then either withdraw or confirm the comments; if confirmed, the Contractor must amend and resubmit the documents (Schedule 6: 7).
- Where the Architect/Contract Administrator fails to respond in time, it shall be regarded that the document has been marked 'A' (Schedule 6: 3). However, neither compliance with the submission procedure nor carrying out the Architect/Contract Administrator's instructions relieves the Contractor of its duty to ensure that the CDP complies with the Contract (Schedule 6: 8:3).
- The Contractor is required to have a competent person-in-charge on site at all reasonable times (3.2) and to permit the presence of the Employer's clerk of works (3.3), who has no prescribed authority.
- The Architect/Contract Administrator's instructions must be in writing (3.8). Instructions empowered include for Variations (3.11), postponement (3.12) and expenditure of Provisional Sums (3.13).

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JCT IC16 and ICD16

- Where work or materials do not conform to the Contract, the Architect/Contract Administrator may order their removal from the Site (3.16). Instructions are empowered concerning inspection and testing (3.14) and there is a particularly helpful provision concerning similar work elsewhere which may be suspect following established failure (3.15).
- The Employer is entitled to carry out work not forming part of the Contract during the time that the Contractor is in possession, subject to certain conditions (2.7).
- After Practical Completion, the Contractor is obliged to rectify defects (2.30) unless the Employer decides otherwise and agrees an appropriate deduction instead.

5 Control: cost

- The quality and quantity of work included in the Contract Sum is clearly defined (4.1) and is related to the documents used.
- The Contract Sum is VAT exclusive (4.5.1) and may only be adjusted as provided for in the Contract (4.3).
- The Contract may include for fluctuations (4.3.2). These are limited to tax, etc (Schedule 4).
- Where Provisional Sums have been included, instructions must be given on how to use them (3.13).
- The Contractor is entitled to recover fees and charges not otherwise provided for (2.3).
- The Contractor is empowered to carry out limited work for emergency compliance with the Statutory Requirements and this will be treated as a Variation to be valued accordingly (2.16).
- Applications for reimbursement of loss and/or expense must be made in writing by the Contractor (4.15). The grounds for a valid application are set out (4.17) and include only matters over which the Contractor has no control and which occur because of action or failure by the Employer. The procedures must be followed precisely, and the Contractor's proper written notice and supporting information is a requirement (4.16). Other rights at common law are preserved (4.19).
- Interim payments are made to the Contractor following the issue of an Interim Certificate by the Architect/Contract Administrator, or if no certificate is issued, following the issue of a Payment Notice by the Contractor.
- The due dates for interim payment are seven days after the monthly valuation dates stated in the Contract Particulars (4.8.1).
- The Architect/Contract Administrator is required to issue an Interim Certificate not later than five days from the due date for interim payment. The certificate should state the amount that the Contract Administrator considers to be due on the

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JCT IC16 and ICD16

relevant due date and the basis on which the amount was calculated (4.8.2). Retention is 5 per cent unless an alternative rate is entered in the Contract Particulars (note IC16 does not use the term 'retention').

- The final date for payment on the Payment Certificate is 14 days from its due date. Unless a Pay Less Notice is issued, the Employer is to pay the sum stated in the Interim Certificate on the final date for payment (4.12.2).
- In relation to interim payments, the Contractor may, not later than the Valuation Date, make an application to the Quantity Surveyor stating the sum that it considers will be due on the relevant due date and the basis on which the sum was calculated (4.11.1).
- Where the Architect/Contract Administrator fails or neglects to issue an Interim Certificate in accordance with 4.8.2, then the Contractor's Payment Application under clause 4.11.1 becomes a Payment Notice (4.11.2.1) and, subject to the service of a Pay Less Notice, the Employer shall pay the sum stated in the Contractor's Payment Notice on the final date for payment (4.12.3).
- Where the Contractor has not made a Payment Application, it may, at any time after the last date for issuance of a Payment Certificate, give a Payment Notice to the Quantity Surveyor, stating the sum the Contractor believes is due on the relevant payment due date and the basis for the calculation (4.11.2.2). In such circumstances, the final date for payment is postponed by the same number of days as the number of days after the last date for issue of the Payment Certificate that the Payment Notice was issued (4.12.4).
- If the Employer intends to pay less than the sum stated in a Payment Certificate or Contractor's Payment Notice, it is required to, not later than five days from the final date for payment, issue a Pay Less Notice stating the sum it considers to be due to the Contractor on the date of the issue of the notice and the basis on which it was calculated (4.12.5). It must be noted that the Employer is not entitled to withhold or deduct any amount from monies due to the Contractor unless the proper Pay Less Notice has been issued.
- Failure to pay by the final date for payment will attract simple interest on the overdue amount (4.12.6 and 1.1) and can give the Contractor a right to suspend some or all of its obligations with a right to recover reasonable costs and expenses incurred as a result of such suspension. Suspension is to be preceded by the service of a seven-day notice and may only progress where there is a failure to remedy the non-payment after the seven-day period (4.14).
- There are precise procedures to be followed in the preparation of the final account after practical completion. Issue of the Final Certificate is within 28 days of sending the final account to the Contractor, or certifying that defects have been made good, or the end of the Rectification Period, whichever is the later (4.21.1).

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JCT IC16 and ICD16

- The due date for final payment is the date of issue of the Final Certificate or, where the certificate has not been issued, the last day of the 28-day period referred to in 4.21.1, and the final date for payment is 28 days from the due date (4.21.3).
- Similar rules to those discussed above for the Interim Certificate apply in respect of the Final Certificate with regard to notices, except that the certificate may show a balance due to the Employer, in which case the Contractor has the right to issue a Pay Less Notice (4.12.5.2).
- The Final Certificate of the Architect/Contract Administrator is only conclusive of certain matters as set out in clause 1.9, and is not conclusive that the Works have been carried out in accordance with the Contract (1.9.1.1).

6 Insurance

- The Contractor is to indemnify the Employer in respect of personal injury or death, and injury or damage to property other than the actual Works (6.1 and 6.2). This is to be backed by insurance and an entry in the Contract Particulars will state the minimum cover.
- If instructed, the Contractor is to take out joint names insurance for the Employer against the risk of claims arising due to legal nuisance. There is a list of exceptions and damage must not be attributable to any negligence on the part of the Contractor. An entry in the Contract Particulars will indicate whether cover may be required and the amount of cover to be provided (6.5).
- Insurance of the Works is for 'all risks' where new buildings are concerned and should be for full reinstatement value. It can be taken out either by the Contractor (Schedule 1, Option A) or by the Employer (Schedule 1, Option B).
- Insurance of existing structures and the contents is a matter for the Employer (Schedule 1, Option C) and is limited to specified perils. New work in existing buildings, although still a matter for the Employer, requires all risks cover. As an alternative, the Parties may set out their own requirements for insurance in relation to work to existing buildings (a C.1 Replacement Schedule).
- Under ICD16 only, the Contractor is required to carry Professional Indemnity Insurance to cover its liability for design, details of which should be set out in the Contract Particulars (6.19).
- The Contract has extensive provisions for insurance to cover various acts of terrorism (6.10–6.12).
- An entry in the Contract Particulars will show whether the Joint Code of Practice on Fire Prevention on Construction Sites is to apply (6.15) and, if so, both the Employer and the Contractor must comply with it (6.16). In the event of non-compliance the insurers can specify remedial measures which have to be taken (6.17).

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JCT IC16 and ICD16

7 Termination

- The Employer is allowed to terminate the employment of the Contractor by reason of specified defaults (8.4) or in the event of the insolvency of the Contractor (8.5) or in the event of bribery (8.6). Where termination is for defaults set out in 8.4, a 14-day warning notice is required before the actual notice of termination by the Employer, which is to take place within 21 days after the expiration of the 14 days.
- The consequences of termination based on the Contractor's default or insolvency or bribery are set out in clause 8.7 and make the Contractor liable for costs and expenses incurred by the Employer in completing the project using another contractor and in securing the Site and materials and any other expenses arising from the termination.
- The Contractor is allowed to terminate its own employment for specified defaults of the Employer (8.9) or in the event of the insolvency of the Employer (8.10).
- Either Party can terminate the employment of the Contractor for listed neutral causes, including grounds set out in regulations 73(1)(a) and 73(1)(c) of the Public Contracts Regulations 2015 (8.11).
- The respective rights and duties of the Parties concerning payment, removal and completion following termination under clauses 8.9–8.11 are set out in detail in clause 8.12.

8 Dispute avoidance and resolution

- A collaborative working clause (Supplemental Provision 1) may be incorporated that requires both Parties to work with each other and the project team in a cooperative and collaborative manner, in good faith and in a spirit of mutual trust and respect.
- If Supplemental Provision 6 is incorporated, each Party should notify the other promptly of any matter that is likely to give rise to a dispute and the nominated senior executives are required to meet to try to resolve it.
- Once a dispute arises, subject to the right of either Party to refer any matter at any time to adjudication, mediation is suggested by the Contract as an appropriate first instance dispute resolution method (9.1).
- Part II of the HGCRA gives either Party a statutory right to refer any difference or dispute arising out of the Contract to adjudication. Article 7 provides for this. The Adjudicator's decision is binding on the Parties, at least until the dispute is finally determined at arbitration or by legal proceedings.
- The adjudication procedures are those of the Scheme for Construction Contracts (England and Wales) Regulations 1998, subject to certain provisions regarding the appointment and qualifications of the Adjudicator (9.2).

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JCT IC16 and ICD16

- Arbitration may be selected as the agreed method for final determination of disputes (Article 8).
- The appointment of the Arbitrator is subject to clause 9.4 and the Arbitrator's powers are clearly defined (9.5).
- The Parties agree that either may appeal to the courts on a question of law (9.7).
- Arbitration is to be conducted in accordance with the JCT 2016 edition of the Construction Industry Model Arbitration Rules and the provisions of the Arbitration Act 1996 shall apply (9.8).
- Where the Contract Particulars do not indicate that Article 8 (arbitration) is to apply, then Article 9 (legal proceedings) will automatically apply.

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JCT IC16 and ICD16

This contract?

If considering using IC16 or ICD16, the following points should be borne in mind.

It is intended for building work of a simple content, without specialist installations, and where the work is adequately specified or billed before tender. The employer is required to appoint a contract administrator and a quantity surveyor.

The ICD16 version allows the contractor to design an identified part of the works. This depends on detailed employer's requirements being issued at tender stage. Although the contractor is to submit further design information before work is carried out, the employer would be sensible to set out exactly what information is required and when in the requirements.

The contract accommodates partial possession and sectional completion. There are also provisions for the contractor and/or its subcontractors to provide collateral warranties on JCT standard forms to purchasers/tenants, funders and to the employer. Rights of third parties under the Contract (Rights of Third Party) Act 2009 are specifically excluded.

It allows for subcontractors to be named and details two procedures. The first requires the naming to be pre-contract and may seem inflexible but brings greater certainty. The second allows for naming during construction and is covered in the contract by a provisional sum. In both cases the subcontractors are domestic and are the responsibility of the main contractor. Use of dedicated documents is mandatory with named subcontractors. As the main contractor is not responsible for named subcontractor design, employers should be advised to use an ICSub/NAM/E agreement for each named subcontractor involved in any aspect of design relating to their work.

When completing the form, decisions are required relating to matters including the following: deferment of possession; bonds (for advance payment, 'listed items'); insurance of the works; Joint Fire Code; liquidated damages; fluctuations; and electronic communications. Caution should be exercised regarding the naming of a quantity surveyor – this should not be left blank, and even if the employer does not agree to appoint a quantity surveyor, the mechanism of the contract still requires a name to be entered to fulfil this role (usually that of the contract administrator).

If acting as contract administrator, note that while some of the procedural rules are less demanding than those for SBC16, care is needed to make sure that action is taken within a reasonable time even though no time limit is stated. This is particularly relevant in relation to named subcontractors.

If used for work in Northern Ireland, an Adaptation Schedule should be incorporated. The form is not suitable for use in Scotland. Where the site of the works is in Scotland, the appropriate Scottish Building Contract Committee form should be used.

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JCT IC16 and ICD16

References and further reading

JCT Intermediate Building Contract 2016
JCT Intermediate Building Contract with contractor's design 2016
JCT Intermediate Sub-Contract Agreement 2016
JCT Intermediate Sub-Contract Conditions 2016
JCT Intermediate Sub-Contract with sub-contractor's design Agreement 2016
JCT Intermediate Sub-Contract with sub-contractor's design Conditions 2016
JCT Intermediate Named Sub-Contract Tender and Agreement 2016
JCT Intermediate Named Sub-Contract Conditions 2016
JCT Intermediate Named Sub-Contractor/Employer Agreement 2016
JCT Collateral Warranty for a Funder 2016
JCT Collateral Warranty for a Purchaser or Tenant 2016
JCT Sub-Contractor Collateral Warranty for a Funder 2016
JCT Sub-Contractor Collateral Warranty for a Purchaser or Tenant 2016
JCT Sub-Contractor Collateral Warranty for the Employer 2016

JCT Intermediate Building Contract Guide 2016
JCT Intermediate Building Sub-Contract Guide 2016

Lupton, S. *Guide to the JCT Intermediate Building Contract 2016*, London: RIBA Publishing (2017)
Chappell, D. *IC11 Contract Administration Guide*, London: RIBA Publishing (2011)

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JCT MW16 and MWD16

Joint Contracts Tribunal Ltd

Minor Works Building Contract 2016 (MW16)

Minor Works Building Contract with contractor's design 2016 (MWD16)

The JCT publishes two versions of its contract for minor works, the Minor Works Building Contract (MW16) and the Minor Works Building Contract with contractor's design (MWD16). The former assumes that the contractor will be provided with the detailed design information it needs to construct all of the works, whereas the latter allows for the contractor to complete the design of identified parts. In all other respects, the contracts are identical. They are intended for smaller projects and can be used by both public and private sector clients. The employer must appoint a contract administrator, who performs a key role including issuing payment certificates and instructions. The contracts do not include some of the features of the longer JCT forms; for example, there is no provision for the employer to select subcontractors or for a contractor's programme. However, they do include clauses relevant to public sector procurement, dealing with matters such as performance targets, confidentiality and corruption.

Background

The Agreement for Minor Building Works was first published in 1968 and was intended for minor building operations and maintenance work for which the JCT Standard Form of Building Contract (then JCT63) was clearly inappropriate. It was just five pages long, compared with nearly 40 pages of the full Standard Form. It was not for use with bills of quantities and was stated to be suitable where the contract sum did not exceed £8,000.

In the 1970s, the RIBA, conscious of certain deficiencies in both the 1963 Standard Form and the Minor Works Agreement, set out proposals for a new, simpler 'short form' of building contract. The RIBA Council readily approved this proposal in June 1978. The aim was to produce a four-page contract with conditions written in plain English and structured logically under eight headings. The JCT accepted the proposal in principle, but the response of their working group was to draft a new 1980 version of the Minor Works form. It was a significant advance, however, and this was the first time that Conditions in JCT forms were arranged under section headings.

MW80 was the subject of 11 amendments, the last of which was to take account of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA). The 1998 edition of the Agreement for Minor Building Works was basically a consolidated version of MW80.

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JCT MW16 and MWD16

In 2005, the Agreement for Minor Building Works was revised, along with all the other JCT standard forms, and for the first time two editions were published, entitled the Minor Works Building Contract and the Minor Works Building Contract with contractor's design. The most significant change was, of course, the provisions in the latter version for the main contractor to undertake a limited amount of design. It is frequently the case in practice that even on smaller projects some design input from the contractor is needed, and this new version was very popular.

The 2005 editions also contained some other changes, including revisions to terminology and clarification of language. A contract particulars section was introduced at the start of the form. The Scheme for Construction Contracts (England and Wales) Regulations 1998 were also adopted into the JCT form and legal proceedings, rather than arbitration, made the default mechanism for the final resolution of disputes.

The 2011 edition of the contract was issued for the primary purpose of ensuring that the contract continued to comply with the provisions of the HGCRA. The changes concentrated mainly on the payment and payment certification provisions.

The 2016 revisions were relatively minor, the key ones being:

- the incorporation and updating of provisions from the JCT Public Sector Supplement relating to fair payment principles and transparency
- amendments relating to the CDM Regulations 2015
- inclusion of references to various provisions of the Public Contracts Regulations 2015
- changes in respect of payment, designed to reflect fair payment principles and to simplify and consolidate the payment provisions (eg interim certificates continue throughout the rectification period) and
- clause 5.4C (works insurance) revised to allow parties to specify their own insurance policy requirements.

Structure

The Minor Works Building Contract is available in two versions: one 'with contractor's design', which has provision for the contractor to design an identified portion of the works (MWD16), and one which does not (MW16). In all other respects the versions are identical, therefore the points raised below can be assumed to apply to both versions, unless indicated otherwise.

Both versions of the form are nearly 50 pages long, but the contract conditions take up only around half of these. The agreement includes seven recitals (eight in MWD16) and eight articles, and the conditions are set out under section headings.

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JCT MW16 and MWD16

A four-page contract particulars section at the start of the form requires information relating to the project to be entered. There are three schedules at the back of the form. Schedule 1, incorporated by clause 7.3, covers arbitration, schedule 2, incorporated by clauses 4.3 and 4.8, is a fluctuations option and schedule 3, incorporated by the seventh recital (or eighth recital in MWD16), comprises six optional supplemental provisions, any or all of which can be selected. Guidance notes are also included at the back of the form.

The supplemental provisions cover: collaborative working; health and safety (eg ensuring this is treated as being of 'paramount concern' to all parties); cost saving and value improvement proposals by the contractor; sustainable development and environmental considerations; performance indicators and monitoring; notification and negotiation of disputes; transparency (the Freedom of Information Act 2000); and compliance with the Public Contracts Regulations 2015.

Use

The contracts are best suited to small-scale projects but can be used for larger works where these are relatively straightforward. The reference to a framework agreement in the recitals and the inclusion of the fair payment and optional supplemental provisions (which are the same as those included in SBC16) make it ideally suited to public sector work, for example enabling work contracts within a planned series of larger projects.

A note regarding appropriate use appears on the inside of the front cover of both versions and further advice is set out in the guidance notes. These clearly state that the contracts are to be used only where the client has engaged a professionally qualified person to act as the 'Architect/Contract Administrator' in administering the terms. They are for use where minor building works of simple character are to be carried out for an agreed lump sum and are not for use with works for which bills of quantities are required or where the duration is likely to be such that full labour and materials fluctuations provisions are required. There is no provision in the forms for the employer to nominate or name subcontractors for specialist work.

The 'with contractor's design' version, unlike SBC16 and IC16, contains very brief provisions relating to that design and does not include requirements for approving design information, or for the contractor to carry professional indemnity insurance. MWD16 should therefore only be used where the contractor design input is limited.

Both versions are for lump sum contracts, whereby the contractor undertakes to provide all the work described in the contract documents for the sum entered in article 2. The contractor will price a detailed contract document or may provide a lump sum price supported by a schedule of rates (third recital and fourth for MWD16).

In many instances where the Minor Works Building Contract is used for domestic work, the HGCRA may not apply to that project and the contract will therefore not

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JCT MW16 and MWD16

be subject to the statutory requirements relating to adjudication and payment provisions. Nevertheless, the forms comply with the Act and include these requirements. If not required by statute, they may be removed but only after taking legal advice.

If used as a direct contract between consumer and contractor of the type to which the Consumer Rights Act 2015 might apply, care should be taken to explain the terms to the consumer or the consumer should take legal advice. There are now other contracts specially drafted for use by consumers in connection with work on their homes, whether or not a consultant has been engaged, which may be more suitable.

Synopsis

1 Roles

- There are two Parties to the Contract, the Employer and the Contractor, who are identified in the Agreement section and who may be private individuals or companies.
- The Contractor's primary obligation is to carry out and complete the Works described in the Contract Documents (Article 1), and under MWD16 it may also be required to design identified parts (the 'Contractor's Designed Portion', or CDP) (2.1).
- The Contractor must comply with all statutory obligations, including giving all required notices (2.1).
- A collaborative working clause (Supplemental Provision 1) may be incorporated that requires both Parties to work with each other and the project team in a cooperative and collaborative manner, in good faith and in a spirit of mutual trust and respect.
- The Employer is required to appoint an Architect/Contract Administrator, who is identified in Article 3. A footnote to this article states that the Employer 'should not at any time appoint himself to the role without the Contractor's prior agreement'. If the Architect/Contract Administrator ceases to act, the Employer must appoint a replacement within 14 days.
- Each Party undertakes to the other that it will comply with the requirements of the CDM Regulations (3.9). The Architect/Contract Administrator will act as Principal Designer and the Contractor as Principal Contractor for the purposes of the CDM Regulations, unless other firms are identified in Articles 4 and 5.
- There is no reference to the Employer appointing a representative or clerk of works or any other consultants, such as a quantity surveyor; if these are engaged they will have no authority under the Contract unless it is amended.
- The Contractor is required to have a competent person in charge on site at all reasonable times (3.2)

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JCT MW16 and MWD16

- The Contractor may sub-contract the Works, including any design, but only with the consent of the Architect/Contract Administrator. The Contractor remains entirely responsible for any work it sub-contracts (3.3).
- Neither the Employer nor the Contractor may assign the Contract, or any rights under the Contract, without the other's consent (3.1).

2 Documents

- The Contract Documents are defined under the Second Recital (Third in MWD16) (although not in the list of definitions in clause 1.1). A wide range of alternative documents are allowed for: Contract Documents comprise the Agreement (which includes the Recitals, Articles and Contract Particulars) and the Conditions, and may also include drawings, a Specification, Work Schedules and a Schedule of Rates. Although none of these are mandatory, the Contractor must have submitted a priced Specification, or priced Work Schedules or a Schedule of Rates (Third Recital or Fourth Recital in MWD16).
- In the case of MWD16, the Contract Documents must include one or more that describe the Employer's Requirements for the CDP (Third Recital).
- The Agreement and the Conditions are to be read as a whole, and nothing in the Contract Drawings, Specification, Work Schedules or Employer's Requirements, or in any Framework Agreement, can override or modify the Agreement or Conditions (1.2).
- The Contractor is encouraged to engage sub-contractors on the JCT Short Form of Sub-Contract, or the JCT Minor Works Sub-Contract with contractor's design, and in any event must include certain provisions in any sub-contract as set out in clause 3.3.2 (relating to the CDM Regulations, termination and interest on late payment – unlike SBC16 and IC16, there are no property vesting clauses).
- Inconsistencies in or between the Contract Specification, the Work Schedules and the Employer's Requirements must be corrected and this may be treated as a variation instruction (2.5 or 2.6 in MWD16).
- The Contractor is to notify the Architect/Contract Administrator in writing if it finds any conflict between Statutory Requirements and its other contractual obligations. Having done that, it will not be liable to the Employer under this Contract (2.5 or 2.6 in MWD16).
- There is a list of defined terms in clause 1.1 and further terms are defined in the Articles. Rules for interpretation are set out in clauses 1.2 and 1.3. The Agreement and the Conditions take precedence over other Contract Documents (1.2); other than this, no priority is set out between Contract Documents.
- The Contract makes no reference to bonds, or to collateral warranties or to the granting of third party rights.

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JCT MW16 and MWD16

- Rights of third parties under the Contracts (Rights of Third Parties) Act 1999 are specifically excluded (1.5).

3 Control: time

- The Works may be commenced on and shall be completed by dates to be inserted in the Contract Particulars (2.2 or 2.3 in MWD16).
- There are provisions for deferring possession, for partial possession or for sectional completion.
- There is no requirement for the Contractor to provide a programme.
- The Contractor is to notify the Architect/Contract Administrator if completion by the stated date is unlikely to be achieved (2.7 or 2.8 in MWD16).
- The Architect/Contract Administrator is empowered to make such extension of time as may be reasonable where the delay is for reasons which are not within the Contractor's control (2.7 or 2.8 in MWD16). (Note: no specific grounds are listed.)
- If the Contractor fails to complete by the stated date, the Employer is entitled to liquidated damages (2.8 or 2.9 in MWD16) at the rate stated in the Contract Particulars. (Note: there is no reference to a non-completion certificate.)
- Practical completion is certified by the Architect/Contract Administrator (2.9 or 2.10 in MWD16).

4 Control: quality

- The Contractor is obliged to carry out and complete the Works in accordance with the Contract Documents, the Construction Phase Plan and the Statutory Requirements (Article 1 and clause 2.1).
- The Contractor is to complete the design for the CDP (2.1.1, MWD16 only). The Contractor should submit such drawings, specifications, calculations, etc to the Architect/Contract Administrator as are reasonably necessary to explain the CDP, and may not commence any work to which these relate until seven days have elapsed (2.1.3, MWD only).
- The Architect/Contract Administrator has power to issue directions to the Contractor to make certain that the CDP can be integrated into the design of the Works as a whole (2.1.2, MWD only).
- In MWD16, the Contractor's liability for design is limited to exercising reasonable care and skill (2.2.1). The Contractor is not responsible for the Employer's Requirements or the adequacy of any design contained within them (2.1.4).
- The Architect/Contract Administrator is obliged to issue any further information necessary to enable the Contractor to carry out the Works (2.3 or 2.4 in MWD16).

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JCT MW16 and MWD16

- The Contractor is required to have a 'competent person in charge' on site at all reasonable times (not constantly) (3.2). There is no provision for a clerk of works.
- The Architect/Contract Administrator may order the exclusion of any person from the Works (3.8).
- There is no provision for naming a sub-contractor and no provision for including a list of approved firms. Note, however, that the Contract does not contain anything which prevents this, although the consequences of adding any such requirements, in particular concerning the extent of the Contractor's responsibility for such firms, would need to be made clear.
- The Architect/Contract Administrator may issue instructions (3.4 or 3.4.1 in MWD116). These are to be in writing; if oral, they have no effect until confirmed in writing. Instructions may include variations (3.6.1) and this would presumably allow for postponement, as no specific reference is made elsewhere. Where, after a seven-day notice period, the Contractor fails to comply with an instruction, the Employer may engage other persons to give effect to the instructions and the Contractor will be liable for all additional costs incurred by the Employer in this process (3.5).
- There is no provision for testing or opening up of work. In the event of failure to meet the Contract standards, and problems over remedial works, refusal to certify, leading to non-payment, would seem to be the ultimate sanction.
- Following practical completion, the Contractor is obliged to rectify defects (2.10 or 2.11 in MWD16). (The Rectification Period is three months, although a longer period may be stated.) A certificate is to be issued by the Architect/Contract Administrator when this obligation has been discharged (2.11 or 2.12 in MWD16).

5 Control: cost

- The Contract Sum is VAT exclusive (4.1). It is subject to adjustment, but only in so far as is provided under the terms of the Contract (Article 2).
- The Contract is fixed price except for limited fluctuations (tax, etc) provided for by Schedule 2 (4.9). If the Parties wish, the Schedule 2 fluctuations provisions can be removed or replaced by alternative provisions. A percentage addition entry is required in the Contract Particulars. (If none, NIL is entered.)
- Instructions must be given if Provisional Sums are included (3.7). The cost of variations is either to be agreed in advance or valued on a fair and reasonable basis, using relevant prices from the priced Contract Specification, Work Schedules or Schedule of Rates as appropriate (3.6).
- Direct loss and/or expense is limited to variations or provisional sum work and is included in the valuation (3.6.3).
- The due dates for interim payments to the Contractor are seven days from the valuation dates entered in the Contract Particulars. Unless stated otherwise, the

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JCT MW16 and MWD16

valuation dates are at monthly intervals, the first being one month after the date of commencement (4.3). The due dates for interim payments continue after practical completion up until the due date for final payment. The Contractor may make an application for payment at any time before the valuation date, stating the amount that it considers is due (4.4.1).

- The Architect/Contract Administrator is required to issue an interim payment certificate not later than five days from the due date for interim payment. The certificate should state the amount that the Architect/Contract Administrator considers is due on the relevant due date and basis on which the amount was calculated (4.3).
- The final date for payment on the interim certificate is 14 days from its due date. Unless a 'pay less notice' is issued, the Employer is to pay the sum stated in the interim certificate (4.5).
- Where the Architect/Contract Administrator fails or neglects to issue an interim certificate in accordance with clause 4.4, then the Contractor, if it has not already made an application for payment, may at any time after the expiration of the five-day period issue a payment notice to the Architect/Contract Administrator, stating the sum that it considers to be due on the relevant due date and the basis for its calculation (4.4.2). Subject to the service of a pay less notice, the Employer shall pay the sum stated in the Contractor's application or payment notice on the final date for payment (4.5.2).
- Where the Contractor's payment notice is issued after the expiration of the five-day period following the due date, then the final date for payment is postponed by the same number of days after such period that the payment notice was issued (4.5.3).
- If the Employer intends to pay less than the sum stated in a certificate or Contractor's payment notice, the Employer is required to, not later than five days from the final date for payment, issue a pay less notice stating the sum it considers due to the Contractor on the date of the notice and the basis on which it was calculated (4.5.4). It must be noted that the Employer is not entitled to withhold or deduct any amount from monies due to the Contractor unless the proper pay less notice has been issued.
- Failure to pay by the final date for payment will attract simple interest on the overdue amount (4.6.1) and can give the Contractor a right to suspend some or all of its obligations with a right to recover reasonable costs and expenses incurred as a result of such suspension. Suspension is to be preceded by the service of a seven-day notice and may only progress where there is a failure to remedy the non-payment after the seven-day period (4.7).
- There is a precise timescale for the preparation of a final account after practical completion. The due date for the final payment is 28 days after either the receipt of documentation from the Contractor or the date specified in the certificate of making good under clause 2.11, whichever is the later (4.8.1).

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JCT MW16 and MWD16

- The Architect/Contract Administrator shall issue the final certificate not later than five days after the due date, and the final date for payment shall be 14 days after the due date (4.8.2 and 4.8.3).
- The same rules as those discussed above regarding interim certificates apply in respect of the final certificate with regard to notices.

6 Insurance

- The Contractor indemnifies the Employer in respect of personal injury or damage to property (5.1 and 5.2). The Contractor is required to arrange insurance to back this liability (5.3). The minimum cover required as a contractual obligation must be entered in the Contract Particulars (5.3).
- The Contractor is obliged to arrange insurance of new works in joint names as specified in clause 5.4A. The percentage to cover professional fees should be inserted in the Contract Particulars.
- There is no provision for the Employer to insure new works.
- Joint names insurance of existing structures, and any new work which is part of an alteration or conversion, is to be arranged by the Employer. The contractual requirement is for cover against specified perils (5.4B).
- There is also provision for the Parties to specify their own insurance arrangements, if they prefer, or if options in clauses 5.4A and 5.4B are not suitable (5.4C). Details of the arrangements and the policies required must be set out in documents identified in the Contract Particulars.

7 Termination

- The Employer may terminate the employment of the Contractor if it fails to proceed satisfactorily with the Works, or if it fails to comply with its obligations under the CDM Regulations, or if it becomes insolvent (6.4 and 6.5). The Architect/Contract Administrator may issue a warning notice, but notice of termination is a matter for the Employer.
- The Contractor may terminate its own employment on the grounds of Employer defaults and insolvency (6.8 and 6.9).
- Either Party may terminate the employment of the Contractor if the Works are suspended due to stated neutral events (6.10).
- The respective rights and duties of the Parties following determination are set out in the Conditions (6.7 and 6.11).

8 Dispute avoidance and resolution

- If Supplemental Provision 6 is incorporated, each Party should notify the other promptly of any matter that is likely to give rise to a dispute, and the nominated senior executives are required to meet to try to resolve it.

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JCT MW16 and MWD16

- Once a dispute arises, subject to the right to refer to adjudication, mediation is suggested as the first instance process for dispute resolution (7.1).
- Part II of the HGCRA gives either Party a statutory right to refer any difference or dispute arising out of the Contract to adjudication. Article 6 of MW16 provides for this.
- Adjudication is to be conducted according to the procedures set out in the Scheme for Construction Contracts, except that the Adjudicator and the nominating body may be stated in the Contract Particulars.
- There is an optional provision for arbitration (Article 7), and if disputes are required to be resolved by arbitration then the Contract Particulars must state that Article 7 and Schedule 1 apply.
- The appointment of the Arbitrator is subject to Article 7 and his or her powers are defined in Schedule 1.
- Arbitration is to be conducted in accordance with the JCT 2016 edition of the Construction Industry Model Arbitration Rules.

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JCT MW16 and MWD16

This contract?

If considering using MW16 or MWD16, the following points should be borne in mind.

The forms are relatively brief and apparently simple. However, it should be remembered that what is expressly stated might not constitute the whole picture. Terms might be implied by common law and the form needs to be used with thought and treated with care.

It is intended for small building work of a simple 'one-off' nature and is not suitable for jobbing or maintenance type work. There are two versions: one for use where some design input is required from the contractor, and one where it is not. It can only be used where the employer has engaged a professional consultant to act as contract administrator. There is no provision for bills of quantities and, although a quantity surveyor may be appointed, it is with no specific role under the contract conditions.

There is no provision for phased completion, naming of subcontractors or design by the contractor. The form is drafted to include compliance with the CDM Regulations, and with the HGCRA, whether or not these apply in full to the particular contract. When completing the form, decisions are required relating to insurance of the works and damages for non-completion.

If acting as contract administrator, note that, although the contract conditions are likely to prove adequate for most situations, should the nature of the work require it, then it might be advisable to clarify the procedural rules before the start of the contract, especially if working with a contractor for the first time.

For slightly larger projects, or those which require more comprehensive conditions, then IC16 or ICD16 might be a safer choice. For work on projects where the client is a residential homeowner who intends to reside in the project, consumer contracts, such as the JCT forms for homeowners, might be more applicable. The Minor Works Building Contract has featured in a surprising number of court cases, often due to being used beyond its intended limits or because of careless administration. It has limitations, particularly concerning contractor design and the termination provisions, and needs to be treated with respect and administered with diligence.

If the contract is used for work in Northern Ireland, an Adaptation Schedule should be incorporated. The form is not suitable for use in Scotland, and where the intended work is located in Scotland, the Scottish Building Contract Committee's Minor Works Building Contract is available.

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JCT MW16 and MWD16

References and further reading

JCT Minor Works Building Contract 2016
JCT Minor Works Building Contract with contractor's design 2016
JCT Short Form of Sub-Contract 2016
JCT Minor Works Sub-Contract with sub-contractor's design 2016

JCT Practice Note: *Deciding on the appropriate JCT Contract* (2016)

Lupton, S. *Guide to JCT Minor Works Contract 2016*, London: RIBA Publishing (2016)
Chappell, D. *The JCT Minor Works Building Contracts 2016*, London: Wiley Blackwell (2017)

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JCT CE16

Joint Contracts Tribunal Ltd

JCT Constructing Excellence Contract 2016 (CE16)

The Constructing Excellence Contract (CE16) is a flexible contract which places a strong emphasis on collaborative working. Although a bilateral contract, it is intended to be used by all the parties in the supply chain for a project and can, for example, be used for consultants' services, for construction work or for a mixture of work and services. It is envisaged that, if all parties contract on the same terms, this will help to harmonise relations between the team. To reinforce this, the contract contains requirements such as a risk allocation table and a risk register, and incentives such as a bonus for early completion. The contract includes a target cost option, whereby the supplier will be paid according to its success in achieving a defined target and bears the full risk of costs exceeding a guaranteed maximum price. There is a separate optional Project Team Agreement, which binds all team members to shared objectives.

Background

With the emphasis being placed on collaborative working following the various industry reports highlighted in earlier chapters, JCT undertook a study of the partnering/collaboration concept and, in its Practice Note 4: *Partnering* (Series 2), communicated its desire to develop an entirely new form of contract that would proactively encourage parties to collaborate.

The JCT Constructing Excellence Contract, first published in 2006, is the JCT's response to the move towards collaborative contracts. The contract drafting process included the formation of a working group between the JCT and Be (one of the industry groups formed as a result of the Latham and Egan Reports) and continued with the Constructing Excellence Group following Be's incorporation into that group. This contract is the result of these joint efforts.

The Constructing Excellence Contract was essentially the JCT's first self-contained partnering contract, its earlier Partnering Charter and framework agreements being intended for use alongside another JCT form. However, CE16 goes much further than simply being a contract that requires the parties to work together collaboratively (all JCT forms now contain collaborative working clauses), it introduces several innovative mechanisms that incentivise the parties to work in this way, including the risk allocation schedule and a target cost option. Arguably, the risk allocation schedule is this contract's strongest provision and encourages the proactive management of risks. There is also a matching Project Team Agreement (CE/P) available which, if used, binds the whole project team into a joint pain/gain payment system.

CE16 is intended to be a contract for major works, although, as it is sufficiently flexible to be an appropriate contract for engagement of the entire project team, it could be used on a wide range of projects.

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JCT CE16

The 2011 edition built on the 2006 edition and brought it up to date with current legislation. In particular, it amended the payment and payment notices provisions, and modified the professional indemnity insurance requirements, as well as offering a revised definition of insolvency.

CE16 incorporated the provisions of the JCT Public Sector Supplement relating to fair payment, transparency and building information modelling (BIM), updated the terms in relation to the CDM Regulations 2015, included provisions to reflect aspects of the Public Contracts Regulations 2015 and simplified the payment provisions, as well as making various minor adjustments to drafting.

Structure

CE16 is one of the shorter contracts in the JCT suite. Although numbering 76 pages in total, the contract particulars and schedules make up 40 pages of this and the terms themselves are relatively clear and concise. The contract has 12 sections, following the typical JCT section-headed format and including supplementary conditions. Its detailed contract particulars section requires more input from the parties than other JCT Building Contracts.

The supplementary conditions cover: health and safety (eg ensuring this is treated as being of 'paramount concern' to all parties); sustainable development and environmental considerations; transparency (the Freedom of Information Act 2000); and compliance with the Public Contracts Regulations 2015.

Use

CE16 is intended for projects 'where participants wish to engender collaborative and integrative working'. It requires a good deal of advanced thought and study, particularly in relation to completing the contract particulars, and may be best suited to larger projects where the client is prepared to devote the resources to ensuring that it is set up correctly (as with any complex arrangement). Used with CE/P, it would be well suited to alliancing for a single project.

The JCT Constructing Excellence Contract Guide is particularly helpful in setting up the contract as it contains many worked examples. It is suggested that the guide would be an essential reference if using this form.

The unique feature of this contract is that it is intended to be used for the engagement of all members of a supply chain, including clients, consultants, contractors and subcontractors (the levels in the supply chain are referred to as 'tiers'). Its flexibility means that the same conditions may be used as a main construction contract, a subcontract or as conditions for the appointment of a consultant. It achieves this flexibility by means of optional clauses in the conditions (those not applicable where the contract is for a consultant's services are highlighted in grey) and by using the contract particulars to determine the specific appointment being made. This is facilitated by the use of the term purchaser (as a replacement for employer) and supplier (replacing contractor in more traditional contracts).

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JCT CE16

In the risk allocation schedule, the parties must identify and allocate all risks before the contract is executed. These include risks that would normally be allocated by the terms of other standard forms. Take, for example, the risk of delays due to exceptionally bad weather. In JCT SBC16, this is a 'relevant event' that entitles the contractor to an extension of time. Here, the parties must decide how the risk is to be allocated; they could, for example, stipulate that the first seven days of delay are the contractor's risk, and that thereafter the risk is shared 50:50 (so, for a three-week delay the contractor would only get a one-week extension). This incentivises the contractor to take immediate steps to minimise the effects of the weather on progress.

The contract offers two options for managing payments under it – target sum and contract sum. The target sum option requires separation of the prime cost of undertaking the work or services (termed the 'Allowable Costs') and the profit margin. The contractor is entitled to an agreed share of the savings if the allowable costs are kept below the target figure, and may only claim an agreed portion of any costs incurred above that target, ie the target cost operates as a pain/gain mechanism. It is also possible to set a guaranteed maximum price, whereby the contractor bears any excess costs above the set price.

There is no provision for matters to be referred to arbitration; all disputes are to be settled by adjudication and, failing that, by litigation under the jurisdiction of the English courts. If the intention is to use the contract outside England and Wales, some amendments are required.

Synopsis

1 Roles

- The Parties to the Contract are defined as the Purchaser and the Supplier, as identified in the Agreement (1.1).
- The Purchaser is to appoint a representative, who shall be the first point of contact for the Project and act on behalf of the Purchaser. The Purchaser's Representative may be replaced for good reasons after the Supplier has been notified (3.5).
- The Contract also makes reference to the 'Client', who is defined as the person procuring the Project, and is identified in the Agreement. Where this is a 'Tier 1' contract, the Purchaser will also be the Client (1.1). The Client is required to be consulted on various matters; for example, the Client must approve any changes to the Programme.
- The Contract refers to the Project Team, defined as 'the integrated team involved in managing the delivery of the Project comprising the Client and the persons listed in Table C of Part 4 of the Contract Particulars and any additional persons who may become members of the Project Team from time to time' (1.1). The members of the Project Team may enter into a Project Team Agreement.

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JCT CE16

- Where there is no Project Team Agreement, the role of the Project Team is set out under clauses 2.3, 2.4 and 2.6 (2.2). These clauses define the Project Team as comprising the Client, the Lead Designer, the Lead Supplier and any other suppliers that the Client considers to be of key importance (2.3). The Project Team is responsible for guiding the successful delivery of the project from design to construction (2.4). It meets at regular intervals, considers risks and opportunities, reviews progress and makes 'any decisions necessary for the successful delivery of the Project' (2.4).
- The Parties set out the general description of the services in the Contract Particulars and also indicate whether the Supplier is retained as a professional consultant (in which case certain listed clauses in the Contract would not apply). A detailed schedule of Services is to be set out in Part 3 of the Contract Particulars. This could include design and other services, manufacture and supply, construction work or any combination of these.
- The Supplier is expected to comply with all statutory requirements and to have regard to codes of practice relevant to the Services (4.18.1).
- The Supplier may be identified in the Contract Particulars as the principal designer and/or the principal contractor for the purposes of the CDM Regulations, in which case it must perform the role in accordance with the regulations (4.18.2).
- The Contract Particulars also state the Supplier's obligation with regard to the Project Programme, progress meetings and in relation to the preparation and updating of the Risk Register. Also, the Parties determine whether the Risk Allocation Schedule is to apply.
- Key members of the Supply Chain are to be identified in the Contract Particulars in Table B, Part 4. While the Supplier may replace any of the persons named in that table, they may only do so with the approval of the Purchaser, which approval is not to be unreasonably withheld. Any replacement is expected to be suitably qualified to perform the relevant role (4.15).
- The Parties choose in the Contract Particulars whether or not to include Key Performance Indicators (measurement of performance) in the Contract. In the event that performance is to be measured, both Parties, throughout the period of the performance of the Services, are to measure each other against the agreed Key Performance Indicators and share feedback during regular reviews. The Supplier is to keep a written record of all performance reviews carried out under the Contract and to provide the Purchaser with copies on reasonable notice (6.1 to 6.4).
- Part 9 allows the Parties to include any Supplementary Conditions required for the Contract. Public authorities may wish to use this section to include conditions relating to release of information (under the Freedom of Information Act 2000 and the Official Secrets Act 1989 among others) and such other specific items as are not catered for in the Conditions.

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JCT CE16

- The Supplier is to use reasonable endeavours to engage the Supply Chain using CE16 or on terms that fully reflect the principles of CE16. Where contracts other than CE16 are used, the Supplier is to provide the Purchaser with a copy of the terms and advice on the differences. The Supplier is to avoid terms which place onerous obligations on the Supply Chain.
- The Supplier is expected to work together with and fully involve the Project Team in the delivery of the Services. As appropriate, the Supplier is expected to include members of the Supply Chain and other relevant Project Participants in project planning, risk and value engineering and other relevant matters (4.16).

2 Documents

- The Contract is to be read as a whole; however, save for supplementary conditions set out or referred to in Part 9, in the case of any inconsistency, the Conditions shall override other documents forming the Contract (1.5).
- A list of definitions relevant to CE16 is included (1.1). Rules for interpretation are set out, including a gender bias clause, and that a 'person' refers to an individual, firm, partnership, company and any other body corporate (1.3).
- Notices under the Contract are to be in writing and deemed to be served when delivered by hand or registered post to the address stated in the contract particulars. Where no address is provided, notices are to be sent to the last known principal address. The Contract suggests that oral notices may be given on immediate health and safety risk issues but that these are to be confirmed by a written notice within three working days (1.7). The footnote explains that if there is to be service by email, a specific protocol would have to be agreed.
- The Purchaser is to provide the Supplier with all information in its possession that it reasonably considers to be necessary for the Project. The Purchaser is also to make available any further information requested by the Supplier within the timescale stated in the Contract Particulars. Additionally, if the Purchaser is engaged pursuant to another Contract, it is to make available to the Supplier information from the other Contract relating to the performance of the Services but may omit commercial and pricing information (3.1). Responses to requests and approvals are also to be made within the timescale stated in the Contract Particulars.
- The Supplier is to notify the Purchaser of any ambiguities or discrepancies in information provided by the Purchaser or any other member of the Project Team and agree on how to resolve such ambiguities. If not resolved amicably, the Purchaser shall issue an instruction. Specific time periods are to be specified for the provision of further information by both Parties and for giving approvals and decisions. The default position is seven days if no period is stated (3.1, 3.2 and 4.1).
- The Supplier grants the Purchaser an irrevocable, assignable and royalty-free licence to use, copy and reproduce all designs and related documents prepared in

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JCT CE16

connection with the Services for any purpose related to the Project, including extension of the Project, but not to reproduce the design for the purpose of the extension of the Project (ie the documents may be used but the design contained in them cannot be copied). Copyright is to remain with the Supplier or the relevant member of the Supply Chain (4.10).

- All royalties payable are the responsibility of the Supplier, who shall indemnify the Purchaser against any claims on account of any intellectual property infringement by the Supplier (4.11).
- Rights of third parties under the Contracts (Rights of Third Parties) Act 1999 are specifically excluded, except as provided for in the Contract (1.6). The Supplier may be required to grant third party rights or collateral warranties as set out in the Contract Particulars.
- The Contract is to be governed by the law of England and Wales. Amendments would be required if it were to be used in Scotland or Northern Ireland (1.9).

3 Control: time

- There is provision to insert a commencement date and date for completion of the Services, and for completion by Sections.
- The Purchaser is to provide access to the site as necessary to enable the Supplier to perform its obligations (3.3).
- The Supplier is expected to complete the Services in accordance with the Contract (Article 1). The Supplier is responsible for the delivery of the Services in accordance with the Contract and for the performance of its Supply Chain (4.2). The Purchaser is to carry out the Services in accordance with the Contract to the reasonable satisfaction of the Purchaser, with personnel and plant necessary for safe, efficient and timely completion (4.3).
- Part 1 of the Contract Particulars may require the Supplier to prepare the Project Programme, in which case the Supplier will also update the programme 'as necessary', showing amendments and sequencing of events or the likely time for any events and also identifying key decision events that will require the decision of the Purchaser or Purchaser's Representative (4.19.1).
- The Supplier would also coordinate any proposed changes to the Project Programme by members of the Supply Chain and, where necessary, meet with the Purchaser (referred to as the Client in this section of the Contract) to explain the proposed changes and how they would affect the completion date, including measures to ensure that the original completion date is achieved. However, where the completion date is to be changed as a result of changes to the programme, the written consent of the Purchaser must be obtained (4.19.1.2).

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JCT CE16

- All amendments to the Project Programme are sent to all supply chain members and cascaded to all Project Participants. This clause reiterates that any amendment or proposal indicating a change to the completion date would require the prior approval of the Client (Purchaser) (4.19.2).
- Part 1 of the Contract Particulars may make the Supplier responsible for arranging progress meetings, in which case the Supplier will arrange, attend and minute regular progress meetings of the Project Team (4.20).
- Either Party is expected to notify the other on the occurrence of any risks included in the Risk Allocation Schedule and the Parties are expected to work together to find the best way of mitigating the occurrence, irrespective of whether the risks constitute a Relief Event or not.
- Either Party is to notify the other on becoming aware that a Relief Event is about to occur or has occurred and they are expected to work collaboratively in dealing with such an event and reducing the consequences of its occurrence (5.9).
- Not later than 14 days after the notification of the Relief Event (or any other period agreed by the Parties), the Supplier is expected to provide the Purchaser with a statement (containing as many details as possible) of the effect of the Relief Event on the costs of performing the Services and/or the completion date/s (5.11).
- The Parties are to work together to agree on the likely effect of a Relief Event, as presented in a statement prepared by the Supplier, and to work together on actions to minimise the adverse effect of the Relief Event. All reasonable efforts are to be used in reaching an agreement. Also, any changes to the costs of performing the Services or completion date or Risk Allocation Schedule are to be agreed in writing (5.13).
- Where the Supplier fails to notify the Purchaser of a Relief Event or fails to issue a statement of the likely effects of such an event, the Purchaser is expected to carry out an assessment of the effect of such event and notify the Supplier accordingly. The delay in the notification of the Relief Event is to be accounted for and any additional costs or time disruption caused by such delay are to be ignored in the assessment of the Relief Event (5.15, 5.16).
- Where the Risk Allocation Schedule applies, the additional financial liability of the Purchaser is dependent on the full expenditure of the amount allocated for the risk and, similarly, any additional time liability to be carried by the Purchaser is dependent on the full use of the time allocated in the schedule for the risk (5.3). Also, the risk of the Parties set out in the Risk Allocation Schedule is fixed and can only be changed by an agreement in writing.
- The Relief Events set out in the Contract include instructions from the Purchaser to change the Services, an act or omission of the Purchaser or anyone for whom the Purchaser is responsible, suspension due to non-payment which affects the

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completion date, the occurrence of any risk referred to in the Risk Allocation Schedule to the extent that the risk is not allocated to the Supplier and also where, although the risk had been allocated to the Supplier, the consequences of the risk have exceeded the costs and time allocated to it or stated to be the responsibility of the Supplier and, finally, the occurrence of any event not envisaged by the Risk Allocation Schedule, which is beyond the control of the Supplier and could not have been reasonably foreseeable at the date of the Contract. This excludes any act, omission or insolvency of the Supplier or members of the Supply Chain and sub-suppliers (5.7).

- It would also be a Relief Event where the Purchaser instructs the Supplier to open up for inspection or to carry out testing of any of the Services, although such instruction will only be a Relief Event where the inspection and tests have not already been provided for in the Contract or where the tests and inspections fail to disclose that the work and/or materials do not comply with the Contract.

4 Control: quality

- Two options are provided for duty of care for Services provided by the Supplier. One is reasonable skill and care, which is the usual standard of care for a professional, and the other option raises the bar to that of a competent designer that is appropriately qualified – this would raise the standard of care to that of a specialist professional (4.4, 4.5).
- Goods and materials to be provided by the Supplier are to be of good quality, conform to the Contract and be devoid of deleterious materials (unless these are instructed by the Purchaser). The Supplier is expected to give due consideration to environmental and sustainability issues in providing goods (4.12 and 4.13).
- The Supplier is to comply with all reasonable instructions from the Purchaser or Purchaser's Representative that are in writing and relate to the Project (4.14).
- Where the Contract Particulars indicate that the Supplier will organise the progress meetings, the Supplier will be expected to schedule the meetings, coordinate attendance and ensure that the meeting records are kept. Where the Contract Particulars do not indicate the Supplier as responsible for the progress meetings, the Supplier shall attend all meetings to which it is invited (4.20).
- Where the Risk Register is to be prepared by the Supplier (this is to be indicated in the Contract Particulars), the Supplier is expected to investigate the risks that may occur in the Project, the probability of the risks eventuating, provide a financial estimate of the likely consequences and propose possible risk mitigation techniques to adopt. Where the Risk Register is to be prepared by another Project Team member, the Supplier is to give all necessary information (5.1). The same rules will apply to the Supplier in terms of updating the Risk Register (5.2).

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- The Purchaser certifies completion after satisfactory inspection and/or completion tests and commissioning. The Completion Date is defined as the date when, in the opinion of the Purchaser, the Services or Services within any relevant Section were completed (3.7).

5 Control: cost

- Article 2 indicates two payment options – the Parties may choose either a Target Cost option or a Lump Sum option in the Contract Particulars.
- Where the Target Cost option is preferred, the Purchaser is required to indicate the minimum set of documents that the Supplier should maintain for Allowable Cost in Part 7 of the Contract Particulars (see below for a description of Allowable Cost).
- Part 7 of the Contract Particulars will indicate the Target Cost (which is the cost set by the Parties under which the Parties share gain and above which Parties share pain), the Supplier's Margin (which could be described as the central office and site office overheads and profit element), the Guaranteed Maximum Cost – this is optional (this could be described as the final and firm cost of the Services above which the risk of excess is the sole liability of the Supplier) and the Allowable Cost (this excludes costs of defective works, Supplier's Margin and other costs excluded by the Parties).
- Where the Target Cost option is the preferred payment option, the Supplier is expected to keep a fully auditable and detailed record of allowable costs, which can be inspected by the Purchaser. The Parties, as stated above, would specify in Part 7 of the Contract Particulars the records that the Supplier is to keep (7.2). The Purchaser is also to have direct access to original receipts and books of account (7.3).
- The Supplier is to provide, on a monthly basis, a breakdown of the Allowable Cost and the Supplier's Margin. Each statement will also indicate the sum that the Supplier considers is due on the Application Date (monthly dates set out in the Contract Particulars) and the basis on which the calculation has been made, along with additional information that may be requested by the Purchaser (7.4.1).
- The Purchaser may disagree with the basis of the costs provided by the Supplier on two grounds, the first being the inclusion of Excluded Costs in the Allowable Cost calculation. The second is that the cumulative Allowable Cost exceeds the Target Cost, in which case only the portion of excess assigned to the Purchaser in the Contract Particulars is payable, or it exceeds the Guaranteed Maximum Cost, in which case no additional Allowable Cost is recoverable. If the Parties fail to agree on the estimate, a meeting may be held to resolve the differences (7.5).
- Where the Purchaser is the Client, and if the breakdown required by clause 7.4.1 is received by or on the Application Date, the due date for payment of the Allowable Cost and Supplier's Margin is seven days after the Application Date (7.6). Different periods are set out if the Supplier is a Tier 1 or Tier 2 Supplier.

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- The final date for payment is 14 days from the due date, where the Purchaser is the Client or a Tier 1 Supplier, and 13 days if a Tier 2 Supplier (7.7).
- Within five days of the Due Date, the Purchaser is to issue a statement to the Supplier stating the amount that it considers is due and the basis for the calculation of that amount (7.8.1). If the Purchaser fails to give this notice, the Supplier's breakdown becomes a payment notice and this amount will be due for payment by the final date for payment unless the Party from which payment is due issues a Pay Less Notice (7.8.2).
- The Party from which payment is due may, five days before the final payment date (or four days if a Tier 2 Supplier), issue a notice of its intention to pay less and the basis for the calculation of this amount. Where a Pay Less Notice is served, the amount to be paid on the final date for payment shall be the sum stated in the Pay Less Notice (7.9).
- If any additional amount falls due to the Supplier in accordance with section 5, the amount of those additional sums will be added to the Target Cost and the Guaranteed Maximum Cost (if any) and those cost headings will be amended accordingly (7.14).
- Changes may be made to the Supplier's Margin; such changes should be in writing and would amend the Contract on signing by the Parties. Unless the Supplier's Margin is expressed as a percentage of the Target Cost, increases and/or decreases would not automatically apply (7.15).
- After the completion of the Services, the Allowable Cost for completing the project, the Supplier's Margin, the final Target Cost and final Guaranteed Maximum Cost (if any) shall be calculated and included in the next breakdown of costs to be issued by the Supplier (7.4.2).
- Where the Allowable Cost of completing the Services is less than the Target Cost, the difference between the two figures will be shared by the Parties in the relevant portions set out in the Contract Particulars (7.11).
- Where the Allowable Cost is greater that the Target Cost but less than or equal to the Guaranteed Maximum Cost, the Supplier shall receive the portion of the excess set out in the Contract Particulars (7.12).
- Where the Allowable Cost is greater than the Guaranteed Maximum Cost, the portion of the cost in excess of the Guaranteed Maximum Cost shall be borne solely by the Supplier (7.13).
- Where the Lump Sum option for the Contract Sum is preferred, payment may be at monthly intervals or, when the Payment Schedules specify that payment is to be on completion of activities or milestones, when the relevant activity or milestone has been completed (7.16), provided that the activities and milestones have been set out in Payment Schedules referenced in the Contract Particulars.

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- On the monthly dates, or dates for completion of the relevant activity or the reaching of the relevant milestone, the Supplier will make an application for payment to the Purchaser. The application will show the sum that the Supplier considers is due and how it was calculated, the total sum previously paid and a statement confirming that the relevant activity or milestone has been reached (7.16).
- The Supplier shall provide any extra information required by the Purchaser (7.17). The Purchaser may also dispute that a relevant activity has been completed or that a milestone has been reached. In such circumstances the Parties may meet to settle such a difference of opinion (7.18).
- Where the Purchaser is the Client, and if the application and statement required by clause 7.16 are received by or on the Application Date, the due date for payment is seven days after the application date (7.19.1). Different periods are set out if the Supplier is a Tier 1 or Tier 2 Supplier (7.19.2 and 7.19.3).
- The final date for payment is 14 days from the due date where the Purchaser is the Client or a Tier 1 Supplier, and 13 days if a Tier 2 Supplier (7.20).
- Similar provisions apply regarding Pay Less Notices as described above in relation to Target Cost payments (7.22).
- The Supplier, apart from being entitled to interest on late payment (7.27), may also, on the failure of the Purchaser to pay an amount due by the final payment date, issue a seven-day notice of its intention to suspend if the Purchaser fails to keep to its payment obligations (7.28). The Supplier is entitled to suspend some or all of its obligations if the non-payment continues after the expiry of the seven-day notice. Where the Supplier exercises this right of suspension, it is entitled to reasonable costs incurred as a result (7.28). Applications for such costs are to be made to the Purchaser and the Supplier is entitled to payment within 20 days of such application.
- Where the liquidated damages clause is activated in the Contract Particulars, the Supplier would be liable to pay the same on failure to complete by the relevant Date for Completion of either the Services or a section of them (7.29). Also, where the bonus for early completion clause has been activated in the Contract Particulars, the Supplier will be due a bonus on completing before the relevant Date for Completion. Both payments are to be within 20 days of notification being sent to the other Party (7.30).

6 Insurance

- The Parties are each required to take out and maintain the insurance stated in the Contract Particulars (8.1.1), which set out the level of cover, the minimum amount of cover, minimum period of cover and the Party responsible for maintaining each type of insurance. If professional indemnity insurance is required, this must be maintained for the period stated in the Contract Particulars (eg 6 or 12 years) from completion (8.1.2).

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- The Supplier is expected to provide details of its insurers and the terms of the policies for the approval of the Purchaser (8.2).
- Either Party also has a right to request that evidence that the insurance is in force and that adequate premiums are being paid is provided within 14 days of such request (8.3).
- The Supplier is to indemnify the Purchaser for any expense with regard to liability for the death or injury of any person due to its, or any person engaged by the Supplier's, negligence/default in connection with providing the Services (8.4). The Supplier is similarly required to indemnify the Purchaser for any loss, injury or damage to property caused by its carrying out the Services due to any negligence/default on its part or that of persons engaged by it (8.5). Where the Contract Particulars include a limitation of liability amount, the liability of the Supplier, except in relation to death and personal injury, shall be limited to the amount stated.
- There is also a provision in the Contract Particulars to limit the liability of the Supplier to a specified sum (8.6).

7 Termination

- The Purchaser may terminate the Contract of the Supplier if any of the following occur: the Supplier fails to rectify any breach notified within 14 days after such notification; the supplier becomes insolvent; and, where the Supplier is a sub-supplier, the Purchaser's Contract is terminated (10.2).
- The Supplier may terminate the Contract on the occurrence of any of the following: if payment remains unpaid 28 days after the final payment date; the Purchaser fails to rectify any breach notified within 14 days after such notification; if the Purchaser becomes insolvent (10.3).
- The Contract sets out procedures for payment following termination (10.5 and 10.6). The Supplier is required to comply with all instructions relating to vacating and securing the Site (10.4, this does not apply if CE16 is used as a professional appointment).

8 Dispute avoidance and resolution

- The Purchaser and the Supplier are to operate the Contract in collaboration, working together in good faith and in a spirit of trust and respect. In particular, the open sharing of information and feedback on performance, drawing attention to difficulties, will be pursued. This is to serve as the Overriding Principle of the Contract (2.1). This Overriding Principle is to be given legal effect in any forum for dispute resolution of matters arising from the Contract (2.9).
- The Parties are to endeavour to notify each other of any anticipated dispute so that it can be avoided by negotiation (11.1).

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- Where a dispute arises, the Parties are to endeavour to resolve it by negotiation in good faith between senior executives nominated in the Contract Particulars (11.2).
- Either Party has the right to refer any dispute to adjudication in line with the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Article 3). The adjudicator and the adjudicator nominating body may be named in the Contract Particulars, and there is provision for the same adjudicator to decide related disputes (11.3).
- Litigation is provided as the final tribunal for the resolution of disputes (Article 4). There is no reference to mediation or arbitration.

This contract?

If considering using CE16, the following points should be borne in mind.

CE16 can be used for procurement of construction works and construction-related services. It is drafted to allow for adaptation throughout the supply chain, including the provision of professional services. It is particularly aimed at collaborative and integrative working and is a suitable contract to be used for partnering.

CE16 can be used for supplier design and it is suitable for works that are to be carried out in sections.

It also offers the flexibility of using either a target cost payment method or a lump sum payment method.

References and further reading

JCT Constructing Excellence Contract 2016
JCT Constructing Excellence Contract – Project Team Agreement 2016
JCT Constructing Excellence Contract Guide 2016

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Joint Contracts Tribunal Ltd

Major Project Construction Contract 2016 (MP16)

The JCT Major Project Construction Contract (MP16) is a flexible form intended for use on large projects where the contractor will both complete the design and construct the works. The contractor is required to engage 'named specialists' and 'pre-appointed consultants' as listed in the contract particulars, taking full responsibility for their work. In the case of novated consultants, the contractor is responsible for services provided both before and after novation, except that the contractor is not responsible for errors in the employer's requirements. It is a lump sum contract with four alternative methods of payment, including by stage and by pre-agreed payments at particular dates. The contract relies on the parties drafting detailed contract documents, such as pricing documents that may include valuation rules and documents setting out insurance requirements. Overall, it places more risk on the contractor than the JCT DB16.

Background

The JCT Major Project Construction Contract was produced for employers who engage regularly in the construction of major projects and have extensive in-house contractual procedures in place. It assumes that the employer will provide the definition of its requirements, access to the site, review of design documents and payments while the contractor will proceed with the works without relying on the employer to provide further instructions or to administer the project.

The extended timescale of major projects has frequently necessitated the works proceeding in phases, the implementation of parallel development of design and construction, payments related to progress and performance and the offering of incentives for time and cost savings. In the past, this has often resulted in employers making extensive modifications to the conditions in otherwise standard forms of contract or using bespoke forms. In 2003, the JCT took the bold step of introducing this entirely new standard form to cater to the needs of this segment of the market. It was a significant departure from anything previously published by the JCT and broke new ground in format, style and language.

As a document it is very open and flexible but it demands the same attributes of its users. The relative brevity, straightforward language and clear procedures make it immediately attractive. However, it is likely to be an appropriate choice only for parties who are already experienced in operations on a major scale and who fully appreciate the nature of the conditions and procedures. They may be relatively brief and uncomplicated but they depend on a high level of understanding and involvement by the parties.

The 2011 edition primarily brought the contract up to date with the amendments to the Housing Grants, Construction and Regeneration Act 1996 (HGCRA). There were

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also changes to the insurance section relating to terrorism cover and providing a new definition for insolvency. The key 2016 changes include new supplemental provisions dealing with transparency and the Public Contracts Regulations 2015 and amendments relating to the CDM Regulations 2015.

Structure

MP16 is much shorter than many design and build standard forms, such as the JCT DB16. This relative brevity is due in part to the use of enabling clauses, which avoid the inclusion of any issues that are irrelevant to a particular project and allow the parties to include their own detailed project-specific requirements on matters such as insurance. It is important to note that, due to this approach, the form does not include the usual term giving precedence to the printed terms, therefore the parties need to take particular care when drawing up the bespoke contract documents and related provisions.

MP16 is logically structured but, interestingly, there are no conventional Articles or Recitals, and the document goes immediately into the 43 contract conditions, which are set out under nine section headings. The conditions begin with an unusually full set of definitions, including the meaning of practical completion.

Unlike most other JCT forms, in MP16 the contract particulars appear after the conditions, at the back of the form. These require project-specific information to be entered and the choice of optional clauses to be indicated. Tables require entries relating to completion by sections and insurances. The particulars are followed by the attestation. Understandably, this is a contract to be executed as a deed.

The document also includes three schedules. Schedule 1 is a third party rights schedule in respect of third party rights from the contractor in favour of the funder, and third party rights from the contractor in favour of a purchaser or tenant. Schedule 2 identifies the pricing document, the rules which govern the manner of payment to the contractor and other pricing information. Details relating to an advance payment bond, progress payment schedule and contract sum analysis must be attached where relevant. Schedule 3 comprises supplemental conditions covering collaborative working, health and safety, sustainable development and environmental conditions, performance indicators and monitoring, notification and negotiation of disputes, transparency and the Public Contracts Regulations 2015.

The form has a number of interesting key features, including the following:

- the employer may name consultants and subcontractors ('Named Specialists'), and may novate consultants previously appointed ('Pre-appointed Consultants')
- the contractor is fully responsible for the work and services provided by named specialists and pre-appointed consultants, with the important exception that the contractor is not responsible for their input into the requirements

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- the employer gives the contractor access to the site, rather than possession
- insurance arrangements are to be set out and agreed by the parties
- interim payments to the contractor will usually be made monthly, but may be on any terms agreed between the parties. There is no provision for retention, but bonds or security measures with similar effect to retention could be created if required
- there are provisions for acceleration, bonus for early completion and sharing of benefits of savings or value improvements
- the employer must appoint a sole representative who has authority to act in all matters under the contract. Other consultants appointed by the employer can expect cooperation from the contractor, but will have no authority under the contract to act for the employer.

Use

The form is published in one version only and, in theory, is therefore available for use in both the private and public sectors. In practice, it is likely to be used mainly for large commercial developments but might also have relevance for public sector projects (supplemental provisions relating to transparency and the Public Contracts Regulations 2015 are now included).

MP16 is a lump sum contract and the contract sum is to be stated in the contract particulars. The employer's requirements could include bills of quantities, but there is no specific reference to these in the document. The contractor's proposals must be accompanied by a contract sum analysis and pricing information, prepared as set out in the requirements and annexed to Schedule 2 of the contract. The requirements and the proposals are key documents on which the agreement is founded.

There is no provision for an independent and impartial contract administrator and administrative functions required under the contract are to be undertaken directly by the employer or the contractor. The employer's representative may exercise all the powers and functions of the employer.

Synopsis

1 Roles

- The Parties to the Contract are the Employer and the Contractor.
- The Contract has no provision for a contract administrator. The Employer is required to appoint an Employer's representative, who will exercise the powers and functions of the Employer under the Contract (21.1).
- The Employer may appoint other advisers who, although assured of cooperation from the Contractor, have no authority under the Contract to act for the Employer (21.2).

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- Where the Contractor undertakes design, it warrants that it will perform to the standard of reasonable skill and care appropriate to a competent professional, and does not warrant fitness for purpose (11.3).
- Should it be thought necessary to stipulate a fitness for purpose obligation, then the JCT Major Project Construction Contract Guide suggests suitable wording, and also gives a reminder of some of the practical problems likely to arise with this kind of provision (footnote to 11.3).
- The Contractor is to comply with all Statutory Requirements and warrants that the design of the Project (except for that contained in the Requirements) complies with the Statutory Requirements (9.1 and 11.2).
- The Contractor is to make any applications and give any notices required by statute and will pass copies of relevant documents to the Employer (9.1).
- The Contractor is appointed as both principal designer and principal contractor for the purposes of the CDM Regulations (7.2). The Contract Particulars also allow for the name of a principal designer previously appointed by the Employer to be entered. If the Contractor is not to act as principal designer, then the Contract would need to be amended (7.2).
- The Contractor warrants that it has the competence and resources to act as principal designer, principal contractor, designer and contractor as required under the CDM Regulations (7.3).
- The Contract provides for the Employer to require the Contractor to engage particular firms (Named Specialists) and consultants that it will novate (Pre-Appointed Consultants).
- If the Employer intends to novate the appointment of consultants to the Contractor, full details of their original appointment and the proposed Model Form of Novation should be included in the Requirements. This requires an appropriate entry in the Contract Particulars (24.1). The Contractor becomes solely responsible under the Contract for services provided by any Pre-Appointed Consultant, including services before and after the novation takes place, except that the Contractor is not responsible for any input they may have had into the Employer's Requirements (24.4).
- If the Employer wishes the Contractor to appoint Named Specialists (that is, sub-contractors or consultants) it must include a name, or list of names from which the contractor may chose, in the Requirements. Such appointments may be in respect of design or carrying out of the works (24.3). The Contractor becomes solely responsible under the Contract for work undertaken by Named Specialists (24.4).
- Payment to the Contractor for the work of Named Specialists or Pre-Appointed Consultants depends upon the novation of Pre-Appointed Consultants and the appointment of Named Specialists being carried out in the manner required under the relevant contract clauses (24.5).

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- Contracts with Pre-Appointed Consultants or Named Specialists may not be amended or terminated by the Contractor without the prior written consent of the Employer (24.6 and 24.7).
- Either before or immediately following termination of such contracts, the Contractor must notify the Employer of the proposed replacement, and the Employer has seven days in which to raise a reasonable objection (24.8).
- The Contractor remains fully liable under the Contract for replacement consultants or specialists, and entirely responsible for any delay and additional cost incurred (24.10).
- The Contractor may not assign either the benefit or burden of the Contract without the consent of the Employer, and this would apply both to construction work and to design work (35.1).
- However, the Employer may assign the benefit of the Contract without consent (35.2) and, furthermore, the Contractor consents to the Employer assigning both the benefit and burden of the Contract to the Funder (named in the Contract Particulars) at any time (35.3).

2 Documents

- The Contract comprises the Conditions, the Contract Particulars, Schedules 1 and 2 and their annexes (which would include, for example, the Valuation Rules and Contract Sum Analysis), the applicable Supplementary Provisions, the Requirements and the Proposals and, where applicable, the building information modelling (BIM) Protocol (1).
- Definitions and meanings are fully tabled. Note in particular Design Documents, Model Form, Practical Completion, Proposals and Requirements (1).
- Rules for interpretation are set out, including a gender bias clause, and that a 'person' refers to an individual, firm, partnership, company and any other body corporate (2).
- Where a BIM Protocol is identified in the Contract Particulars, any reference in the Contract to documents or information incorporates any requirement in the Protocol (2.5).
- The Employer is responsible for the Requirements, and the Contractor is not responsible for the contents of these, or for the adequacy of design contained in these (11.1).
- If a discrepancy within the Requirements is found, the Contractor must notify the Employer which provision it intends to follow. If the Employer wishes the Contractor to proceed otherwise, that instruction is treated as a Change (10.2).
- If a discrepancy within the Proposals is found, the Employer will instruct the Contractor which provision should be adopted and that instruction is not treated as a Change (10.3).

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- Copyright in all design documents prepared by the Contractor remains vested in the Contractor and the Employer is given an irrevocable licence to use them for the purposes of the Project. Where the Contractor does not own the copyright in any design document it shall procure a licence from the copyright holder (13.1 and 13.2).
- All communications between the Parties relating to the Contract are to be in writing, or may be made electronically by the procedures specified in the Contract Particulars (5.1). Any notice under the Third Party Rights Schedule or relating to termination must be given by actual delivery, registered post or recorded delivery (5.2).
- Rights of third parties in general are excluded, but a Third Party Rights Schedule forms part of the Contract, in respect of the Funder and a Purchaser or Tenant (4 and 36.1).

3 Control: time

- The Contractor is given access (not exclusive possession) to the site or parts of the site, which leaves the Employer free to have work undertaken by others at the same time as the Project (15.1).
- The Contractor must proceed regularly and diligently to achieve Practical Completion on or before the Completion Date (15.1).
- The Contract allows for completion by Sections, and completion dates for each Section (together with rates of damages and bonus) are to be entered in the Contract Particulars.
- The Contractor must use reasonable endeavours to prevent or reduce delay to progress or to completion (15.3).
- The Contractor must notify the Employer when, in its opinion, Practical Completion has occurred and, if it agrees, the Employer will issue a certificate of Practical Completion (15.4).
- If the Contractor fails to achieve Practical Completion by the Completion Date, it becomes liable for liquidated damages at the rate stated in the Contract Particulars (16.1).
- With the consent of the Contractor, the Employer may take over any part of the Project prior to Practical Completion (17.1), and must then issue a statement identifying the part, the date and the value of the part (17.2). The rate of liquidated damages is reduced in proportion to the value of that part.
- Unless there is anything to the contrary in the Contract, the Contractor will be entitled to an extension of time in respect of eight listed events. Of these, four are for 'neutral causes' and the other four relate to any Change, interference by other persons on site, valid suspension of performance for non-payment and acts of prevention by the Employer. Interestingly, exceptionally adverse weather is not listed (18.1).

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JCT MP16

- Whenever the Contractor becomes aware that progress of the Project is being or is likely to be delayed due to any cause, it must forthwith notify the Employer of the cause of the delay and its likely effect on the completion of the Project (18.2).
- Where the Contractor considers that delay is caused by one of these listed events, it must provide supporting evidence, and revise this as necessary (18.3).
- Within 42 days of receipt of such notification, the Employer must notify the Contractor of such adjustment to the Completion Date as the Employer considers fair and reasonable, or give reasons why the Completion Date should not be adjusted (18.4).
- The Employer may review its decisions at any time in the light of further documentation (18.5).
- Within 42 days after Practical Completion of the Project, the Contractor may provide further documentation to support any further adjustment to the Completion Date, and within 42 days of receiving that information the Employer must review decisions made previously, and either confirm or adjust the Completion Date (18.6).
- No adjustment to the Completion Date to bring about an earlier Completion Date is possible except by agreement (18.8).
- However, the Employer can investigate the possibility of acceleration by inviting proposals from the Contractor. The Contractor must either make proposals or explain why it is impracticable to achieve an earlier date (19.1).
- If the date of Practical Completion is earlier than the Completion Date, then the Employer is liable to pay the Contractor a bonus at the rate entered in the Contract Particulars (20).

4 Control: quality

- Materials and goods are to be of the kinds and standards described in the Contract, and where not described are to be reasonably fit for the intended purpose (11.4).
- Where described goods and materials are not procurable, the Contractor must propose alternatives of an equivalent or better standard. Only if the alternative is of a lesser kind or standard, and acceptable to the Employer, will it be treated as a Change (11.4).
- Workmanship is to be of the standards described in the Contract or otherwise is to be executed in a 'good and workmanlike manner' (11.5).
- The Contractor is responsible for the preparation of further design documents, following the procedure set out in any agreed BIM Protocol or, if none is agreed, according to the provisions in clause 12 (12.1).
- The design documents are to be submitted to the Employer for review in the quantities and format identified in the Contract Particulars, and as shown on the design programme contained in the Requirements or Proposals (12.2).

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- The Employer is to respond by returning design documents to the Contractor marked either 'A Action', 'B Action' or 'C Action' (12.3).
- The Contractor is to execute work marked 'A Action' and can expect to be paid accordingly (12.6.1).
- The Contractor is to execute work marked 'B Action', provided that the Employer's comments are incorporated and a further copy of the document is immediately submitted to the Employer. The Contractor can expect to be paid accordingly (12.6.2).
- The Contractor must not execute work marked 'C Action' but must resubmit a document which takes account of the Employer's comments (12.6.3).
- Regardless of comments made by the Employer and subsequently incorporated into the design, the Contractor is still responsible for ensuring that any design document it prepares is in accordance with all the requirements of the Contract (12.10).
- Instructions from the Employer must be in writing and must be empowered under the Contract. The Contractor must comply with such instructions (8.1).
- Where the Contractor fails to comply then, subject to seven days' notice in writing, the Employer may engage others to give effect to the instruction and the Contractor is liable for the extra cost (8.3).
- Where an instruction gives rise to a Change, this may entitle the Contractor to additional payment and an extension of time. However, not all instructions will be treated as giving rise to a Change, and where the Contract states this, the Contractor will not receive additional payment or time. This will not relieve the Contractor of any obligations under the Contract (8.2).
- Changes are alterations in the Requirements or Proposals which affect either the substance of what the Contractor is to provide under the Contract or the manner of its provision (1). As the Contractor is responsible for all further design information, then, excepting discrepancies and Statutory Requirements, Changes will be mainly due to variations required by the Employer.
- Ground conditions or 'man-made obstructions' encountered by the Contractor will only give rise to a Change where they could not have been foreseen (14.2).
- Each Party is to notify the other immediately if it is considered that an instruction gives rise to a Change, or any event occurs which should be treated as giving rise to a Change (26.1).
- The Employer may instruct the Contractor to open up and test work and materials. If the findings show all to be in accordance with the Contract, this will constitute a Change. If the work, materials or goods are not in accordance with the Contract, it will not be a Change (22.1).

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- Where work, materials or goods are not in accordance with the Contract, then the Employer may instruct their removal, or may allow them to remain but with a price reduction. The Contractor will not be entitled to loss and/or expense or extension of time. The Employer may instruct additional work necessary as a consequence, and may also instruct further opening up and testing relating to similar work, materials or goods elsewhere (22.2). No such instructions shall be treated as a Change (22.3).
- During the 12 months following Practical Completion (termed the Rectification Period), the Employer may instruct the Contractor to remedy any defect (23.1).
- Where the Contractor does not remedy defects as instructed, then the Employer may engage others to give effect to the instruction (23.1). The Employer must issue a statement identifying which of these defects it intends to rectify, and which it does not (23.3).
- After expiry of the Rectification Period, and with all defects rectified, the Employer shall issue a certificate to that effect (23.2).

5 Control: cost

- The Contract Sum, which is VAT exclusive, is entered in the Contract Particulars (1).
- The Pricing Document identified in the Contract Particulars is part of the Contract and should contain the rules which will determine the method of payment, the contract sum analysis and pricing information, such as rates, preliminaries and overheads which can be used in the valuation of Changes.
- Four different methods of payment are identified in Schedule 2: Rule A (interim valuation, ie on the amount of work done), Rule B (stage payment, ie on the number of defined stages completed), Rule C (progress payments, ie pre-agreed payments on specific dates, to be adjusted if the Contractor's progress falls behind that required to finish by the Completion Date) or Rule D (some other method). These rules are described in the Pricing Document. If no rule is selected, then A will apply.
- Valuation of a Change and any adjustment of the Completion Date may be by agreement, or by the Employer on the basis of a quotation provided by the Contractor, or, if no quotation is received or agreed, on a fair valuation basis. The valuation is to be inclusive of any loss and/or expense (26.3 to 26.6).
- Other factors which may result in adjustments to the Contract Sum include amendments to the Requirements and Proposals as suggested by the Contractor, which represent cost savings and value improvements resulting in a financial benefit to the Employer (25), and a bonus payable for early completion (20). The former will be the proportion of any benefit calculated as stated in the Contract Particulars and the latter will be at the daily rate entered in the table in the Contract Particulars.

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- Unless the Requirements state that specific fees and charges are the responsibility of the Employer, the Contractor will pay all fees or charges in connection with the Statutory Requirements (9.2).
- Changes in statutory obligations that arise after the Base Date and were not previously announced must be taken into account and will be treated as giving rise to a Change (10.5).
- The Contractor has only limited rights to reimbursement of loss and/or expense outside the inclusive valuation of Changes, which include breaches or actions of prevention by the Employer (27.2).
- If the Contractor wishes to claim loss and/or expense, it must give timely notification and provide an assessment of the loss and/or expense with information updated as necessary. Within 14 days of receipt of such information, the Employer must ascertain the amount and notify the Contractor (27.5). Payment will be included in the next payment advice. Any claim for further ascertainment must be made by the Contractor within 42 days after Practical Completion of the Project, and the Employer must review these particulars and notify the Contractor of any additional payment appropriate within a further 42 days (27.6).
- Where a Contractor considers that it is due a payment, it should make a detailed application for payment to the Employer not later than the Interim Valuation Date stated in the Contract Particulars, stating the sums it considers should be included under items in the Employer's payment advice, the amount it considers due as interim payment on the due date (defined as seven days after the Interim Valuation Date) and the basis for calculation (28.1).
- Where the Contractor makes an application for payment or the Employer considers that a repayment is due to it, the Employer shall issue an interim payment advice to the Contractor not later than five days after the due date. The Contract makes an exception in that, where an interim payment due date is on or immediately after Practical Completion, there shall be no need to issue a payment advice if the amount due to either Party is below the minimum stated in the Contract Particulars (28.2).
- Each interim payment advice is to state the amount due to the Contractor (determined in accordance with the Pricing Document), the value of any Changes, the amount of any reductions, any amount due to either party because of any circumstance in the Contract and the total payments that have previously been made (28.3). It should be noted that there is no provision for payment covering unfixed materials or cost fluctuations, although these could be incorporated if desired. There is also no express provision for retention.
- The final date when payment is due to the Contractor is 14 days from the due date or, if later, seven days from the date of receipt of the VAT invoice from the Contractor. Where payment is due to the Employer, the final date for payment is 14 days from the due date for payment (28.5).

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- Unless a 'pay less notice' is issued, the Employer (or Contractor where a repayment is due to the Employer) shall pay the amount stated on the payment advice on the final payment date. Where a payment advice is not issued in accordance with clause 28.3, the Employer shall pay the amount stated as due in the Contractor's payment application (28.6).
- No later than 42 days after Practical Completion of the Project, the Contractor may provide particulars of any further valuation in respect of any Change, and within 42 days of receipt of the particulars the Employer must review relevant previous valuations (26.9).
- The Employer is to issue a final payment advice after the statements required to be issued at the completion of the Rectification Period by the Contract have been issued. The final payment advice should state the amount the Contractor is entitled to, stating the Contract Sum, the final amounts with regard to interim payments and deductions and any deductions that may be necessary under the statement issued at the conclusion of the Rectification Period. The final payment advice should state who a final payment is due to – the Contractor or the Employer (28.7).
- The final payment advice shall be final, binding both Parties on all issues relating to the amount owed to the Contractor by the Employer unless, within 28 days after it is issued, the Contractor disputes any aspect of it by commencing an adjudication or litigation (28.8).
- The Employer or the Contractor may pay an amount less than the total stated in the payment advice or, in the circumstance where it applies, the payment application, if it serves the other party with a pay less notice seven days before the final date for payment, stating the amount it considers due and the basis for its calculation (29).
- Where a pay less notice is issued, the amount stated therein must be paid on the final date for payment (29.2).
- If payment is not made in accordance with the Contract, interest of 5 per cent over base rate will become payable on outstanding amounts (30.1).

6 Insurance

- The Contractor indemnifies the Employer in respect of personal injury or death and damage to property other than the Project, always assuming that these arise in the course of carrying out the Project and are not due to some act or neglect for which the Employer has responsibility (32.1).
- The Employer indemnifies the Contractor against expense, liability, loss, claim or proceedings arising under statute or common law in respect of personal injury or death and damage to property other than the Project, always assuming that these arise in the course of carrying out the Project and are due to some act or neglect for which the Employer has responsibility (32.2).

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- The Contractor's liabilities in clause 32.1 are limited to issues not included in the expected risks and it is not expected to provide insurance for those matters, with the exception of terrorism cover as required under clause 33.
- Most major projects are likely to need bespoke insurance arrangements and this Contract requires the policies to be identified in the Contract Particulars, with the detailed requirements for those policies set out in annexed documents (33.1).
- Either Party may be required to provide and maintain cover, and the other Party may request documentary evidence (33.2). Failure to provide satisfactory evidence within seven days will allow the other Party to take out insurance and recover the costs involved (33.3).
- Where compliance with the Joint Fire Code is a contract provision and the insurer requires remedial measures, the Contractor must implement these and this is not treated as giving rise to a Change (33.1).
- Where the insurance for the site and materials excludes terrorism, the Party responsible for maintaining such insurance shall take out and maintain terrorism cover. Where terrorism cover is required but ceases to be available, the Party responsible for that insurance must notify the other Party (33.8). The risk then rests with the Employer (33.9).
- Where Professional Indemnity insurance is required, a relevant deletion is required in the Contract Particulars and the limit of indemnity is to be entered (34.1 and 34.2). The Contractor may be required to take out and maintain cover until 12 years from the date of Practical Completion of the Project, always assuming that cover remains available at commercially reasonable rates (34.2).

7 Termination

- The Employer may, by issuing a further notice, terminate the employment of the Contractor if, after having given the Contractor 14 days' notice of a material breach, the Contractor has failed to remedy the breach (39.1 and 39.2). The Contractor's employment may also be terminated in the event that the Contractor becomes insolvent (39.3).
- Material Breach is a defined term and, in relation to the Contractor, includes failure to proceed regularly and diligently, failure to comply with an instruction, suspension of the Project, breach of the CDM Regulations, breach of provisions relating to Named Specialists or Pre-Appointed Consultants, failure to insure, breach of the Construction Industry Scheme requirements, failure to make a due payment and any repudiatory breach (1).
- Upon termination, the Contractor must provide the Employer with all design documents and must not remove any materials, plant or equipment from site without permission. The Employer may then make appropriate arrangements to complete the Project (39.4). Only when the Project has been completed or, if no

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JCT MP16

other arrangements for completion have been made, within six months of termination, must the Employer issue a payment advice (39.5 and 39.7).

- The Contractor may, by issuing a further notice, terminate its employment if, after having given the Employer 14 days' notice of a material breach, the Employer has failed to remedy the breach (40.1 and 40.2). The Contractor may also terminate its employment in the event that the Employer becomes insolvent (40.3).
- Material Breach by the Employer is defined and includes failure to make payment in accordance with clause 28.6, failure to insure and any repudiatory breach (1).
- Upon termination, the Contractor must remove all materials, plant or equipment from site without delay and prepare an account of amounts due (40.4).
- Either Party may terminate the Contractor's employment if the Project is substantially suspended for the period stated in the Contract Particulars due to causes which include force majeure, Specified Peril, hostilities involving the United Kingdom and terrorism (41.1).
- Upon termination, the Contractor must provide the Employer with all design documents, remove all materials, plant or equipment from site without delay and prepare an account of amounts due (41.4).

8 Dispute avoidance and resolution

- Disputes or differences between the Parties in relation to the Project (note not simply the customary 'arising under this Contract') may be submitted to mediation if the Parties agree, or referred to adjudication in accordance with the provisions of the relevant Scheme for Construction Contracts (England and Wales) Regulations 1998 (42 and 44). The Adjudicator may be named in the Contract Particulars, or a nominating body selected.
- The Contract states that the objective of mediation should be to reach a binding agreement. The mediator or method of selecting the mediator is to be agreed by the Parties. There is no provision for naming either in the Contract (43).
- The final resolution of disputes would appear to be by legal proceedings. There is no provision for arbitration (42).
- The law of the Contract is to be the law of England (6).

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JCT MP16

This contract?

If considering using MP16, the following points should be borne in mind.

It is intended for use where both the employer and the contractor, together with their respective teams of specialists and subcontractors, are experienced in substantial commercial projects. The employer is required to appoint a representative who will exercise all the powers and functions of the employer under the contract. Other advisers may be appointed but they will have no authority under the contract to act on behalf of the employer.

The requirements and the proposals are at the heart of this contract, and it is important that both are fully and meticulously completed. There is no prescribed format but it should be remembered that this contract is very reliant on the requirements stating clearly what is to be delivered, and the manner of delivery. Specific points which may be considered for inclusion are helpfully listed in the JCT Guide to this contract. Specially drafted clauses in the requirements or other contract documents are likely to override any conflicting terms in the printed form.

The contract provides for design by the employer, as shown and described in the requirements, with further design by the contractor. The requirements may stipulate that the contractor engages consultants pre-appointed by the employer under a novation agreement. The JCT Guide lists some of the matters which need to be covered in the novation agreement, which should become part of the requirements (the parties may wish to consider using the CIC Novation Agreement – *ab initio* 2018). The contractor accepts liability for services of novated consultants, whether performed before or after novation, except that it is not liable for errors in the requirements (even if prepared by those consultants).

Normally, design liability is restricted to the exercise of reasonable care and skill, but the Guide offers an alternative fitness for purpose obligation, should this be required.

Completing the contract particulars requires entries on matters such as the contract sum, requirements, proposals, pricing document, names of the funder and adjudicator, entries relating to the application of optional clauses, such as those for ground conditions, liquidated damages, bonus rates, pre-appointed consultants and named specialists, cost savings, payments, insurances, professional indemnity and communications.

It should be noted that there is no provision for arbitration, although this could be added.

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JCT MP16

This is a form which is simpler and shorter than either SBC16 or DB16 and which can be tailored to the needs of the project. However, its use should be approached with care because, although the openness and apparent brevity of the conditions is admirable, professional and sometimes legal advice might be advisable to produce a reasonably balanced set of documents. The contractor assumes more risks and responsibilities than under other JCT forms of contract, but provided that the risks can be fully identified and priced for at tender stage, this should not present a problem for experienced operators.

References and further reading

JCT Major Project Construction Contract 2016
JCT Major Project Sub-Contract 2016
JCT Major Project Construction Contract Guide 2016
JCT Major Project Sub-Contract Guide 2016

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JCT DB16

Joint Contracts Tribunal Ltd

Design and Build Contract 2016 (DB16)

This contract is intended for design-build procurement and depends on the employer having prepared its detailed requirements for the project, which are issued at tender stage. In response, the contractor submits its design proposals, and the requirements and proposals form part of the contract package. The contractor is responsible for completing the design but is not responsible for any design provided by the employer, or for other aspects of the employer's requirements. The contract can be used by public and private sector clients. It is bilateral and there is no role for a contract administrator, and no requirement to appoint a quantity surveyor, although the employer may appoint an agent to act on its behalf. DB16 is a lump sum contract, supported by a contract sum analysis. The employer may require the use of particular subcontractors by naming them in the employer's requirements. The contract includes a range of optional provisions to encourage collaborative working, such as a fair dealing clause, the use of negotiations and performance targets. It also includes clauses relevant to public sector procurement, dealing with matters such as the use of building information modelling (BIM), confidentiality and corruption.

Background

During the mid-1970s, a time of popular enthusiasm for industrialised approaches to building, contractor-led design-build became established as an important method of building procurement. It was recommended in the National Economic Development Office (NEDO) report, *Construction for Industrial Recovery*. The then Department of the Environment development management working group on value for money in local authority housing also pressed its apparent advantages. The RIBA was asked to raise, together with the JCT, the need for a standard form under which, for a lump sum, a contractor would design and construct the works to an employer's stated requirements.

By this time, the Department of the Environment and the National Federation of Building Trades Employers had their own contract forms and fee scales for projects where a building was designed (sometimes using contractor-designed components) to a client's specific requirements. However, no form of contract existed for use by local authorities or the private sector which fairly apportioned the responsibilities, obligations and risks of the parties. Clearly, a new form was needed which would deal with the situation where the appointment of neither an architect nor a quantity surveyor was envisaged.

The drafting of the new form was protracted, continuing for six years. However, when it was finally published in 1981 as the JCT Standard Form of Building Contract with contractor's design (JCT WCD81), it was an immediate success and widely accepted within the building industry. Supplementary provisions introduced in February 1988 greatly increased its usefulness and flexibility.

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JCT DB16

The main changes in the 2011 edition concerned the payment and payment certificate provisions. Other changes included the extension of the role of the principal contractor to cover the Site Waste Management Plans Regulations 2008, the revision of the provision on terrorism cover and minor changes in the definition of insolvency and terminal payment rules.

The key 2016 changes can be summarised as follows:

- incorporation and updating of provisions from the JCT Public Sector Supplement
- changes relating to fair payment principles, transparency and BIM
- amendments relating to the CDM Regulations 2015
- inclusion of references to various provisions of the Public Contracts Regulations 2015
- changes in respect of payment, designed to reflect fair payment principles and to simplify and consolidate the payment provisions
- provision for monthly payments, including during the rectification period
- tightening up of the arrangements to secure provision of third party rights/warranties from subcontractors
- simplification and rationalisation of drafting in many areas; for example, calculation of amounts due and provisions for rectification following damage covered by insurance.

Structure

DB16 runs to over 100 pages in total. The agreement includes seven recitals and nine articles and may be executed under hand or as a deed.

Seven schedules are included at the back of the form: schedule 1, a design submission procedure; schedule 2, supplemental provisions; schedule 3, insurance options; schedule 4, a code of practice relating to testing; schedule 5, third party rights; schedule 6, forms of bonds; and schedule 7, fluctuations.

The supplemental provisions are in two parts. Those in part 1, which apply only if selected, deal with named subcontractors and contractor estimates of the value of changes and loss and expense. Those in part 2, which apply unless deleted, cover acceleration quotations, collaborative working; health and safety (eg ensuring this is treated as being of 'paramount concern' to all parties); cost saving and value improvement proposals by the contractor; sustainable development and environmental considerations; performance indicators and monitoring; notification and negotiation of disputes; transparency (the Freedom of Information Act 2000); and compliance with the Public Contracts Regulations 2015.

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Article 1 states the express obligation of the contractor as being to 'complete the design for the Works and carry out and complete the construction of the Works' (note that the obligation is to complete the design and not carry out the design). In article 3, the employer nominates a person to act as 'Employer's Agent'. This agent may be an architect, surveyor, project manager or any other suitable person, and his or her duties and any limits to his or her authority should be clearly established from the outset. (The contract wording often refers to the 'Employer' having a duty or right in certain matters, and the agent's appointment terms must reflect these responsibilities and authority.)

In practice, the form is often used where the scheme design has been developed to a substantial extent and it is common practice to appoint consultants to prepare the employer's requirements in considerable detail, often including the production of detailed design and even some production drawings. However, the role as advisor to the employer is quite distinct from that of employer's agent.

Although the form bears a marked resemblance to SBC16, and in parts the conditions are similarly worded, the difference between the forms is fundamental. There is no role for a contract administrator to act fairly as between the parties. The basis of the agreement is the compatibility between the employer's requirements on the one hand and the contractor's proposals on the other.

By the second recital, the contractor is obliged to submit proposals and a tender figure. The contractor is also obliged to produce a contract sum analysis. The third recital places on the employer the obligation to examine the contractor's proposals. The wording falls short of a warranty by the employer, but this obligation must be treated cautiously because it suggests that the contractor's proposals prevail in the event of a conflict (the form is frequently amended to reverse this). Where the employer accepts some divergence, the employer's requirements should be amended before the contract documents are signed.

The contractor's proposals should respond to and be consistent with the employer's requirements, indicating where amendment or amplification is advisable. They should not include prime cost or provisional sums unless the employer agrees to this, in which case the requirements must be amended. They should include any necessary plans, elevations, sections and typical details, information about the structural design, services layout drawings, and specifications for materials and workmanship not already provided in the employer's requirements, although specifically requested in those requirements.

This is a lump sum contract payable periodically, based on the contractor's valuation. The amount included in each valuation is based on the amount of work completed or the number of predefined milestones achieved. The conditions make no reference to bills of quantities or a schedule of rates. The contract sum analysis will therefore be used for valuing changes in the employer's requirements, valuations for interim payments and for calculating the reimbursement of increased costs by the 'formula

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JCT DB16

rules'. The contract sum analysis is to be submitted with the tender and the employer's requirements might stipulate the format and headings to be used, possibly as prepared by the employer's quantity surveyor consultant.

Use

DB16 is suitable for larger works where the employer has defined its requirements and the contractor is expected to develop and complete the design as well as carry out the works. The contract envisages the appointment of an employer's agent, who may be an external consultant, to administer the project.

The form places on the contractor the same design responsibility as that of an architect or other appropriate professional designer (2.17). This, of course, is to use reasonable skill and care. It is not an absolute warranty, except to the extent that housing designs must satisfy the provisions of the Defective Premises Act 1972. The contractor is required to take out professional indemnity insurance to back this liability. Details of the cover required, including the period for which it must be taken out, are entered in the contract particulars.

Liability for consequential loss occurring as the result of design failure by the contractor may be limited to an amount to be entered in the contract particulars (2.17). As each set of circumstances is different, the employer should take advice from insurance experts.

The employer's requirements may be anything from a simple written statement of performance requirements to a completely developed scheme design, with outline specification and drawings indicating spatial arrangements, materials and finishes, which may have received full planning permission already. However, there is no provision for design input from the employer after completion of the tender documents, except by way of a variation or 'Change', as this form terms it. Where this occurs, the employer must bear the full cost of such variation, including any consequential expense to the contractor.

The form is therefore not suitable in situations where the employer wishes the contractor to take full responsibility for the whole design, including design, specification and other information prepared by the employer pre-tender. If that is required then forms such as the FIDIC Silver Book should be considered. It is also not suitable where the employer wishes to engage a consultant to administer the contract and manage the design development. Attempts to novate consultants in the hope that they will implement the employer's objectives for the project, and/or report back to the employer, will not achieve the same effect as using a form that allows for an independent consultant role.

Synopsis

1 Roles

- The Parties to the Contract are termed the Employer and the Contractor.

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- The Contractor's principal duty is to design and construct the works as described in the Contract Documents (Article 1).
- It is the Contractor's duty to comply with all statutory obligations and give all required notices (2.1). This would include, for example, applying for planning permission, if needed. This obligation is limited in that it does not apply to the extent that any parts of the Employer's Requirements state specifically that they comply with Statutory Requirements (2.1.2).
- Each Party undertakes to the other that it will comply with the requirements of the CDM Regulations (3.16). The Contractor is to act as both Principal Designer and Principal Contractor unless the name of another person is inserted in Articles 5 and 6.
- A collaborative working clause (Supplemental Provision 5) may be incorporated that requires both Parties to work with each other and the project team in a cooperative and collaborative manner, in good faith and in a spirit of mutual trust and respect.
- The Contract makes no provision for a contract administrator or quantity surveyor, or for a clerk of works.
- The Employer is required to identify an Employer's Agent with full authority to act on its behalf in the issuing of consents, instructions, notices, etc (Article 3). The Contractor shall provide access for the Employer's Agent to the site and workshops at all reasonable times (3.1).
- Except in the case of named sub-contractors, sub-contracting any part of the Works, including any design, requires the Employer's consent (3.3.1).
- Where Supplemental Provision 1 is incorporated, the Employer may require the Contractor to sub-contract the work to named sub-contractors, by means of naming them in the Employer's Requirements.
- The Contractor is responsible for the performance of all sub-contractors, including named sub-contractors, and its liability for completing the design and carrying out the works is not affected by the Employer's requirement to sub-contract to named firms (3.3.1 and Schedule 2: 1.6).
- Neither the Employer nor the Contractor may assign the Contract, or any rights under the Contract, without the other's consent (7.1).

2 Documents

- The Contract Documents are defined in clause 1.1 as comprising the Agreement (which includes the Recitals, Articles and Contract Particulars), the Conditions, the Employer's Requirements, the Contractor's Proposals, the Contract Sum Analysis and the BIM Protocol.
- The Contractor's Proposals are to be accompanied by a Contract Sum Analysis (Second Recital) and the Employer needs to examine both carefully, because the

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assumption is that it is satisfied that they meet the Employer's Requirements (Third Recital).

- A list of definitions relevant to DB16 is included (1.1). Rules for interpretation are set out, including a gender bias clause, and that a 'person' refers to an individual, firm, partnership, company and any other body corporate (1.4).
- The Agreement and the Conditions are to be read as a whole, and nothing in any other Contract Document, or in any Framework Agreement, can override or modify the Agreement or Conditions (1.3).
- If the Contractor becomes aware of any inadequacy or divergence between the Employer's Requirements, the Contractor's Proposals or Design Documents, or any employer instructions, it must notify the Employer (2.13).
- Where there is a discrepancy within the Contractor's Proposals, the Contractor proposes an amendment and, whatever solution the Employer accepts, the cost will be borne by the Contractor (2.14.1).
- Where there is a discrepancy within the Employer's Requirements, and the Contractor's Proposals do not deal with it (in which case they would prevail), the necessary amendments will constitute a Change (2.14.2).
- The Contractor is to notify the Employer if it finds any conflict between the Statutory Requirements and the Employer's Requirements or the Contractor's Proposals, or any further design information prepared by the Contractor. The Employer's consent is required for any necessary amendments (2.15.1).
- The Contractor is to propose the necessary amendments, to be at its own cost except where the conflict results from a change to Statutory Requirements since the Base Date (2.15.2).
- Except where the Contractor fails to notify a divergence of which it has become aware between the Contract Documents and statutory provisions as provided under clause 2.15, the Contractor shall not be liable for the contents of the Employer's Requirements or for verifying the adequacy of the design contained in them (2.11).
- Rights of third parties under the Contracts (Rights of Third Parties) Act 1999 are specifically excluded (1.6).
- The Contract provides for third party rights to be assigned to purchasers/tenants and funders (7A and 7B). The requirement to grant third party rights to identified persons, together with information regarding limits to the Contractor's liability, must be set out in a separate document (the Rights Particulars) referred to in the Contract Particulars. The rights are set out in Schedule 5.
- The Contract provides options for collateral warranties to be provided by the Contractor to purchasers/tenants and funders (7C and 7D), and by sub-contractors to purchasers/tenants or funders and/or the Employer (7E). The requirement to enter

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into warranties must be set out in the Rights Particulars and the relevant persons and sub-contractors identified, together with information regarding the limits to the Contractor's liability.

- The warranties provided by the Contractor to the purchaser/tenant and funder are to be on the JCT standard forms CWa/P&T and CWa/F (7C and 7D). The JCT also publishes SCWa/P&T, SCWa/F and SCWa/E for use in relation to sub-contractors, but their use must be required by the Parties under the Rights Particulars (7E).
- All consents or permissions obtained by the Contractor must be passed on to the Employer (2.1.3).

3 Control: time

- Dates for possession and completion should be entered in the Contract Particulars (termed Date of Possession and Date for Completion, 1.1).
- There is provision for dividing the Works into Sections, and setting separate commencement and completion dates, and rates of liquidated damages for each Section. All provisions relating to timing (for example, extending the Date for Completion) apply separately to each Section, except that there is only one final certificate.
- An option for deferment of possession not exceeding six weeks is available, subject to an entry in the Contract Particulars (2.4).
- The Contractor must commence work on the Date for Possession and proceed regularly and diligently and complete on or before the Completion Date (2.3).
- There is no requirement for the Contractor to provide a master programme.
- If the Contractor fails to complete by the Completion Date (the Date for Completion as subsequently adjusted), liquidated damages are payable at the rate stated in the Contract Particulars (2.29), provided the Employer issues the required notices.
- Notice of delay must be given to the Employer as soon as it becomes apparent that the Works are being or are likely to be delayed, together with supporting information, including the Contractor's estimate of the likely effect on completion (2.24). The Employer is required to notify the Contractor of its decision relating to the Completion Date as soon as is reasonably practicable and in any event within 12 weeks (2.25.1 and 2.25.2).
- The interim decision by the Employer is subject to review no later than 12 weeks following practical completion (2.25.5). While it is possible to reduce extensions already awarded, the original contract period cannot be reduced (2.25.6.3), except by agreement through acceptance of a Change Valuation (Schedule 2: 2) or an Acceleration Quotation (Schedule 2: 4) (termed a Pre-agreed Adjustment).
- The list of Relevant Events for which an extension of time may be awarded includes reference to strikes, etc affecting design work, delay resulting from seeking necessary

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permissions or approvals and the effect of changes in statutory obligations or terms of consents which arise after the Base Date entered in the Contract Particulars (2.26).

- Where progress is disturbed because of the discovery of antiquities, the Contractor is obliged to inform the Employer and to take all necessary action to preserve the status quo and avoid disturbance (3.15.1). The Employer must issue instructions and the Contractor is entitled to ascertained loss and/or expense (3.15.2).
- The Employer may take possession of completed parts of the Works prior to practical completion, with the consent of the Contractor, in which case practical completion is deemed to have occurred for that part, provisions relating to defects and insurance apply to that part and liquidated damages are reduced in proportion to the value of that part (2.30–2.34).
- Achievement of practical completion, to include sufficient compliance by the Contractor in providing as-built drawings and information for the health and safety file, is confirmed by a written statement from the Employer (2.27).

4 Control: quality

- The Contractor is obliged to carry out and complete the Works referred to in the Contract Documents (which would include the Employer's Requirements and the Contractor's Proposals). The Contractor is also obliged to complete the design for the Works and to select materials, goods and workmanship otherwise necessary but not referred to in the documents (2.1.1).
- Kinds and standards of materials and goods will be either those referred to in the Employer's Requirements or, if not included in the Requirements, as described in the Contractor's Proposals or other Contractor's Design Documents (2.2.1). As the Contractor is not responsible for the Employer's Requirements (2.11), if the Employer has specified these in the Requirements, then this will reduce liability on the Contractor. If described in the Proposals, or subsequently selected by the Contractor, then the Contractor will normally be wholly liable in the event of failure.
- The Contractor is liable for its own design work to the extent that it warrants reasonable care and skill (2.17.1). However, where the Contract is for housing work which is subject to the terms of the Defective Premises Act 1972, the limit of liability in clause 2.17.1 will not apply (2.17.2).
- The Contractor's design warranty includes for consequential loss not covered by liquidated damages (eg loss of use, loss of profit, etc) and can be limited to an amount entered in the Contract Particulars (2.17.3).
- The Employer may issue instructions to the Contractor, who must comply 'forthwith' (3.5). The Conditions clearly define what instructions are empowered and these may include a Change (3.9.1) and postponement of any construction work or design (3.10).

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- The Employer cannot order a Change which modifies the design of the Works without the Contractor's consent (3.9.1).
- The Contractor is required to have a competent Site Manager on site at all material times (3.2).
- Access for the Employer's Agent is covered, but this may be subject to reasonable restrictions as far as workshops are concerned (3.1).
- The Contract allows for work under the direct control of the Employer to be carried out during the time that the Contractor is in possession (2.6).
- Where work or materials do not comply with the Contract, the Employer may instruct the Contractor to remove them from site (3.13.1). The Employer may also order any consequential Changes necessary, which will not attract any extension of time or addition to the Contract Sum. It may order tests and inspections (3.12) and the likelihood of any non-compliance in similar work elsewhere is covered (3.13.3 and Schedule 4).
- The Contractor is required to submit drawings and other documents that it prepares in relation to the design (the 'Contractor's Design Documents'), 'as and when necessary'. The submission is to follow a procedure set out in Schedule 1 (2.8).
- The Employer is to respond by returning the design documents marked either 'A', 'B' or 'C' within 14 days of the receipt of the Contractor's Design Documents or (if later) within 14 days from either the date or expiry of the period for submission of such designs stated in the Contract. The Contractor is to execute work marked 'A' or 'B', though in the case of the latter it must incorporate comments by the Employer. The Contractor must either revise and resubmit all design documents marked 'C' or notify the Architect/Contract Administrator that it disagrees with the comments (Schedule 1: 5.3). The Architect/Contract Administrator must then either withdraw or confirm the comments; if confirmed, the Contractor must amend and resubmit the documents (Schedule 1: 7).
- Where the Employer fails to respond in time, it shall be regarded that the document has been marked 'A' (Schedule 1: 3). However, neither compliance with the submission procedure nor carrying out the Employer's comments relieves the Contractor of its duty to ensure that the Contractor's Design Documents and the Works comply with the Contract (Schedule 1: 8.3).
- The Contract requires all work to be carried out in a proper and workmanlike manner, and in accordance with the Construction Phase Plan (2.1). In the event of failure to comply, and although this might under other circumstances be interference with the Contractor's working methods, the Employer is empowered to issue instructions (3.14).
- After Practical Completion, the Contractor is obliged to rectify defects (2.35) unless the Employer decides otherwise and agrees an appropriate deduction instead.

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5 Control: cost

- The Contract Sum is VAT exclusive and may only be adjusted as provided for in the Conditions (4.4.1 and 4.1).
- The Conditions offer three alternatives for adjusting the sum by means of changes in market conditions (Fluctuations, 4.2, 4.12 and 4.13): increases in taxes, including landfill tax, levies or contributions promulgated after the date of tender (Option A, Schedule 7); increases in the cost of labour and materials assessed as a net increase (Option B, now downloadable from the JCT website); or in accordance with Formula Rules (Option C, also downloadable). The preferred option is selected in the Contract Particulars; if none is selected, Option A applies.
- Where Provisional Sums have been included, instructions must be given by the Employer (3.11). The valuation of work carried out where a Change has been instructed, or where Provisional Sums are included, is to be by agreement or by the application of the Valuation Rules (5.2).
- In addition, if the relevant optional provision has been included, the Contractor may be invited to submit an estimate of the value of work which is the subject of a Change (Schedule 2: 2.2). Such an estimate, if accepted, would bind the Contractor to the direct cost of work, the time implications and any loss and/or expense which might apply (Schedule 2: 2.4). In the event that the quotation is not accepted, an instruction may still be issued to proceed with the work, but it will then be subject to the Valuation Rules (5.2 and Schedule 2: 2.5). If the variation quotation is not accepted, the Contractor is paid a fair amount for the cost of its preparation (Schedule 2: 2.5).
- The Contractor can only claim statutory fees or charges where these are allowed for in the Employer's Requirements by way of a provisional sum. Otherwise there is no adjustment to the Contract Sum.
- The Contractor is empowered to carry out limited work for emergency compliance with Statutory Requirements and this will be treated as a variation to be valued accordingly (2.16).
- The Contractor must make written application for reimbursement of loss and/or expense. The grounds for any valid application are set out (4.20) and include only matters over which the Contractor has no control and which occur because of action or failure by the Employer. Other rights at common law are preserved (4.23).
- DB16 allows for advance payment of the Contractor (4.6, an entry is required in the Contract Particulars) and this might be subject to an Advance Payment Bond (Part 1, Schedule 6). The sum is to be reimbursed to the Employer in agreed amounts and at agreed times.
- The due dates for Interim Payments are seven days after the monthly valuation dates stated in the Contract Particulars, provided that the Contractor makes an application

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to the Employer not later than the Interim Valuation Date (4.7.2). If the application is received later, the due date is seven days from the date of receipt of the application (4.7.3).

- The calculation of the amount due at the valuation date will depend on which of two options has been selected in the Contract Particulars: Alternative A (Stage Payments) or Alternative B (Periodic Payments) (4.7.1). Despite the titles of these alternatives, the selection affects the calculation of the amount, not the timing of the payments. For Alternative A, the amount due is based on the value of all stages that have been completed (but not of any stage that is partly complete) (4.12). For Alternative B, the amount due is the value of all work properly completed, together with on-site materials (4.13). Both options allow for payment for off-site items, provided these are Listed Items in accordance with clause 4.15.
- The Contractor is required, not later than the valuation date, to make an interim application to the Employer, stating the sum that it considers to be due at the relevant due date and the basis on which the sum was calculated (4.7.3).
- Not later than five days after each due date the Employer issues a Payment Notice to the Contractor stating the sum that it considers to be due to the Contractor on the due date and the basis for its calculation (4.7.5).
- The amount due is to be calculated in accordance with clauses 4.12 (Alternative A) or 4.13 (Alternative B) and clause 4.14, and should include, as appropriate, any amount deducted as retention, the cumulative total of any advance payments that have become due for reimbursement in accordance with the Contract Particulars, and sums stated in previous notices.
- The final date for payment of each Payment Notice is 14 days from its due date (4.9.1). The sum to be paid, subject to any Pay Less Notice, is the sum stated on the Payment Notice (4.9.2).
- Where a Payment Notice has not been issued in accordance with the Contract, the Employer, unless it issues a valid Pay Less Notice, will be liable to pay the sums stated in the Contractor's application (4.9.3).
- Where the Employer intends to pay less than the amount stated in a Payment Notice or Interim Payment Application, it shall, not later than five days before the final date for payment, issue a Pay Less Notice, stating the amount it considers to be due and the basis for its calculation (4.9.5.1).
- Failure to pay by the final date for payment will attract simple interest of 5 per cent over the current base rate (4.9.6 and 1.1) and can give the Contractor a right to suspend some or all of its obligations with a right to recover reasonable costs and expenses incurred as a result of such suspension. Suspension is to be preceded by the service of a seven-day notice and may only progress where there is a failure to remedy the non-payment after the seven-day period (4.11).

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- Retention is applied to all interim payment notices (4.16), unless the alternative of the Contractor providing a bond in lieu of retention is selected (4.17). Half the retention amount will be released at practical completion (4.18.2).
- There are specific timescales for the receipt of the Final Statement and supporting documentation from the Contractor (4.24); if the Contractor does not comply, the Employer may issue a final statement. The due date for final payment is one month after whichever of the following occurs last: the end of the Rectification Period, the date stated in the Notice of Completion of Making Good, the date of the Final Statement (4.24.5). The Party shown as due a payment in the statement must then issue a Final Payment Notice within five days of the due date (4.8). The process of payment and Pay Less Notices follows the same rules as the ones discussed above for Interim Payments (4.9).
- The Final Statement is only conclusive of certain matters as set out in clause 1.8, and is not conclusive that the Works have been carried out in accordance with the Contract (1.8.1.1).

6 Insurance

- The Contractor indemnifies the Employer in respect of personal injury or death (6.1) and injury or damage to property other than the actual Works (6.2). This is to be backed by insurance (6.4) and the minimum amount of cover required is entered in the Contract Particulars.
- If instructed, the Contractor is to take out joint names insurance for the Employer against the risk of claims arising due to collapse, vibrations, lowering of water level, etc (equivalent to the tort of nuisance). There is a list of exceptions, and damage must not be attributable to any negligence by the Contractor. An entry will indicate whether cover may be required (6.5) and the amount of cover to be provided.
- Insurance of the Works is for 'all risks' where new buildings are concerned and should be for full reinstatement value. It can be taken out either by the Contractor (Schedule 3, Option A) or by the Employer (Schedule 3, Option B). In both cases the insurance is to be in joint names.
- Insurance of existing structures and the contents is a matter for the Employer (Schedule 3, Option C) and is limited to specified perils. New work in existing buildings, although still a matter for the Employer, requires all risks cover. As an alternative, the Parties may set out their own requirements for insurance in relation to work to existing buildings (a C.1 Replacement Schedule).
- The Contractor is required to carry professional indemnity insurance to cover its liability for design, details of which should be set out in the Contract Particulars (if no amount of cover is stated, the insurance is not required).
- An entry in the Contract Particulars will show whether the Joint Code of Practice on Fire Prevention on Construction Sites is to apply (6.17) and, if so, both Employer and

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Contractor must comply with it. In the event of non-compliance, the insurers can specify remedial measures, which must be undertaken.

- In the event that terrorism cover is withdrawn and is no longer available, the situation and options open to the Employer are dealt with in clause 6.11, as applicable.
- It is expected that where any act of terrorism has not been adequately covered under existing insurance policies, the Party indicated as responsible for maintaining such policies shall, from time to time, take out and maintain the appropriate insurance cover for terrorism. The Contract points to Pool Re Cover, or similar successive schemes, as appropriate avenues for obtaining such polices.

7 Termination

- The Employer is allowed to terminate the employment of the Contractor by reason of specified defaults (8.4). One reason is failure to proceed regularly and diligently with the performance of its obligations (8.4.1.2), which would include the carrying out of design work and the obligation to provide drawings. The Employer is first to issue a warning notice, and may follow this with the determination notice. In the case of insolvency of the Contractor, the Employer may at any time terminate the Contractor's employment by notice (8.5.1).
- The Contractor is allowed to terminate its own employment for specified defaults (8.9.1) or if the Works are suspended for a specified period due to a default of the Employer (8.9.2). In the event of insolvency of the Employer, the Contractor may elect to terminate its own employment (8.10).
- Either Party can terminate the employment of the Contractor for listed neutral causes (8.11.1). One is delay in obtaining planning permission, provided that the Contractor has taken all practical steps to avoid or reduce the delay (8.11.1.6). Further grounds are those set out in regulations 73(1)(a) and 73(1)(c) of the Public Contracts Regulations 2015.
- The respective rights and duties of the Parties concerning payment, removal and completion are set out in detail (8.7 and 8.12). Note that the Contractor's obligation extends to providing the Employer with copies of all drawings, etc prepared, and that the Employer's obligation for payment includes design costs.

8 Dispute avoidance and resolution

- If Supplemental Provision 10 is incorporated, each Party should notify the other promptly of any matter that is likely to give rise to a dispute, and the nominated senior executives are required to meet to try to resolve it.
- Once a dispute arises, subject to the right of either Party to refer any matter at any time to adjudication, mediation is suggested by the Contract as an appropriate first instance dispute resolution method (9.1).

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- The Housing Grants, Construction and Regeneration Act 1996 (Part II) gives either Party a statutory right to refer any difference or dispute arising out of the Contract to adjudication. Article 7 provides for this.
- The procedure for adjudication is as set out in the Scheme for Construction Contracts (England and Wales) Regulations 1998, subject to some limited provisions regarding the appointment of the adjudicator (9.2). The adjudicator's decision is binding on the Parties, at least until the dispute is finally determined at arbitration or by legal proceedings.
- Article 8 establishes arbitration as an agreed method for final resolution of disputes, provided that the Contract Particulars indicate that Article 8 and clauses 9.3 to 9.8 are to apply. Unless these provisions are shown to apply, then disputes are to be referred for legal proceedings (Article 9).
- The appointment of the Arbitrator is subject to an entry in the Contract Particulars, and his or her powers are defined (9.5). The Parties agree that either may apply to the courts on a question of law (9.7).
- Arbitration is to be conducted in accordance with the JCT 2016 edition of the Construction Industry Model Arbitration Rules (9.3) and the provisions of the Arbitration Act 1996 shall apply (9.8).

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This contract?

If considering using DB16, the following points should be borne in mind.

It is intended for use where the contractor is to accept responsibility for design of the works to a greater or lesser extent as the employer requires. The contractor is to use reasonable skill and care in achieving this (ie it does not provide a fitness for purpose warranty). The more responsibility the contractor assumes for design, the clearer the boundaries of design responsibility become. While, at first sight, this contract shares many similarities with SBC16, a fundamental difference is the absence of any provision for a contract administrator or quantity surveyor to act on the employer's behalf.

The employer's requirements and contractor's proposals are the core of this contract and it is important that they are in harmony. The contract sum analysis should be adequately detailed in coverage. Completing the form requires care, particularly because of the number of contract particulars and supplementary provisions available.

The employer would be well advised to consider incorporating the optional supplementary provisions, particularly those relating to named persons in the employer's requirements and the submission of estimates by the contractor relating to the valuation of changes and loss and expense.

If acting as employer's agent, any limits to authority should be clarified and a clear understanding reached on what is empowered by the employer under the contract. If acting as consultant advising the employer, care is needed to stay strictly within the limits of the appointment, especially once work starts on site. If acting for the contractor under a novation agreement, accountability should be clearly established and respected.

The form is for use in England and Wales. The Scottish Building Contract Committee has published a Design and Build Contract for use in Scotland as part of its 2016 suite.

References and further reading

JCT Design and Build Contract 2016
JCT Design and Build Sub-Contract Agreement 2016
JCT Design and Build Sub-Contract Conditions 2016
JCT Contractor Collateral Warranty for a Funder 2016
JCT Contractor Collateral Warranty for a Purchaser or Tenant 2016
JCT Sub-Contractor Collateral Warranty for a Funder 2016
JCT Sub-Contractor Collateral Warranty for a Purchaser or Tenant 2016
JCT Sub-Contractor Collateral Warranty for the Employer 2016

JCT Design and Build Contract Guide 2016
JCT Design and Build Sub-Contract Guide 2016
JCT Practice Note: *Deciding on the Appropriate JCT Contract* (2011)

Lupton, S. *Guide to JCT Design and Build Contract 2016*, London: RIBA Publishing (2017)

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JCT MC16

Joint Contracts Tribunal Ltd

Management Building Contract 2016 (MC16)

This contract is to engage a management contractor who will manage and let works contracts for packages of work on a sequential basis, under the direction of a consultant team. The management contractor engages the works contractors directly and is required to ensure that the project is carried out in an expeditious manner in accordance with the contract documents. The management contractor is not required to undertake any work nor is it responsible for any design. The contract requires a contract administrator, who may also issue instructions in relation to the works contracts.

Background

For 'fast-track' projects where the employer still wants the overall design, specification and contract administration left in the hands of an independent professional team, management contracts offer a solution. Their use in the UK became popular during the 1980s, but in recent years they seem to have lost ground to construction management. Major client bodies have become more sophisticated and better able to handle the direct involvement associated with this latter type of procurement.

In 1979, the RIBA Council, on the advice of its Contracts Committee, asked the JCT to produce a standard form of management contract. At the time, the only forms available were those devised by contracting organisations who pioneered this kind of working. These were often geared to suit the preferred working procedures of the companies and, understandably, drafted with their particular interests very much in mind.

In 1987, the JCT issued the Standard Form of Management Contract (MC87) together with related documents necessary for management contracting. The main documents were the head contract between the employer and the management contractor, and works contracts between the management contractor and each 'works contractor' carrying out a package of the work.

Structure

The documents are currently published in the 2016 edition and MC16 is in the familiar JCT format with section-headed conditions.

The main contract between the employer and the management contractor covers both the pre-construction period and the period of actual construction work. It contains a detailed contents list and the articles of agreement which follow include recitals, articles and contract particulars. These are in two parts: part 1 relating to information required generally and part 2 relating to specific supplemental information that will be required before construction work can start.

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The first recital briefly describes the works required for the project and the second recital confirms that the employer has appointed a professional team (the 'Consultant Team'). The third recital refers to the provision of site facilities by the management contractor as set out in annex A to the contract. The fourth recital confirms that the management contractor is to cooperate with the consultant team, both in the pre-construction period and in the construction period, and to provide the services set out in annex B. This is a key part of the contract, as it sets out the services to be provided by the management contractor both pre-construction (annex B, part 1) and during the construction period (annex B, part 2). The detailed list set out in annex B is said to be indicative, the parties may wish to draw up their own list, in which case this must be made clear in part 2 of the contract particulars.

Article 1 confirms the management contractor's agreement to perform the services defined in the fourth recital, for the amounts which the employer agrees to pay under article 2.

The names of the architect/contract administrator and the quantity surveyor are to be entered in articles 3 and 4. Other members of the professional team are to be entered in article 5.

In article 8, the employer undertakes to have project drawings and the project specification and a project cost plan prepared as soon as reasonably practicable after the date of the contract. Under article 9, the employer undertakes to have necessary information prepared by the professional team in respect of the works contracts.

The appointments of the principal designer and principal contractor for the purposes of the CDM Regulations are covered in articles 6 and 7. Article 10 confirms the rights of either party to refer disputes to adjudication, while article 11 covers whether the final resolution of disputes is to be by arbitration or by litigation.

The contract may be executed under hand and not as a deed or, as is more likely with this type of contract, as a deed.

Use

The management contractor may be appointed by the employer prior to the start of construction, at an early enough stage to be able to contribute to the work of the professional team. For this it will expect to receive a fee. Then, assuming that the project proceeds to the construction period, the management contractor will appoint works contractors to carry out the work packages. For this it will be paid a management fee and be reimbursed the prime costs, as defined in schedule 1.

Management contractors are almost invariably selected by tender and after interview. The fee is not usually the main criterion; MC16 is, above all, a contract about resources and the ability to manage many works contractors effectively.

The management contractor will advise on the choice of the works contractors. They will normally be appointed following competitive tendering, and on the basis

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of the JCT Management Works Contract (MCWC/A and MCWC/C) and Management Works Contractor/Employer Agreement (MCWC/E). The management contractor starts with a contract cost plan and programme dates and is responsible for the appointment of works contractors, their coordination and supervision and the provision of all site services and facilities.

The project may be divided into sections, with separate commencement and completion dates, and separate rates of liquidated damages. These sections do not necessarily correspond precisely with the works packages, ie a works contractor could undertake work on several sections. Clearly, organising a project on this basis will require sophisticated programming by the management contractor.

Tight financial control is essential and considerable reliance is placed on the ability of the management contractor to monitor the cost plan total, even though an independent surveyor is appointed by the employer. The management contractor is under a contractual obligation to achieve completion on time, although any design developments or detailed changes in work packages which occur as the work proceeds could give rise to extensions of time. The contract still requires the management contractor to use 'best endeavours' and also allows for acceleration of parts of the works.

Synopsis

1 Roles

- The Parties to the Contract are the Employer and the Management Contractor. An Architect/Contract Administrator is identified under Article 3 and a Quantity Surveyor under Article 4.
- The Management Contractor is required to ensure that the Project is carried out in a proper, workmanlike, economical and expeditious manner in accordance with the Contract Documents and the Construction Phase Plan (2.3.1).
- The Management Contractor is not required to undertake any work nor is it responsible for any design.
- It is the Management Contractor's duty to secure compliance with all Statutory Requirements and to give all required notices (2.3.7).
- Each Party undertakes to the other that it will comply with the requirements of the CDM Regulations (3.23). The Architect/Contract Administrator is to act as Principal Designer and the Management Contractor as Principal Contractor unless the name of another person is inserted in the appropriate Article.
- The Management Contractor is required to cooperate with the Consultant Team, the members of which are identified under Article 5.
- The Contract is split into two periods. During the Pre-Construction Period, the Management Contractor consults with the Consultant Team with a view to reaching agreement on the Project Cost Plan, the dates of possession and completion and

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other key matters as set out in clause 2.1, and provides the Pre-Construction Services listed in Annex B, Part 1 (or in a separate document agreed by the Parties).

- During the construction period, the Management Contractor carries out the work using Works Contractors, as identified in the project plan, or in the Architect/Contract Administrator's instructions, and provides the construction period services listed in Annex B, Part 2 (or in a separate document agreed by the Parties).
- Regarding in the control of Works Contracts, the Management Contractor's obligations in respect of the Employer are fully set out (2.3). Alleged breaches by the Management Contractor or by Works Contractors are covered (5.1–5.4).
- The Management Contractor has to identify the management personnel employed on the Project and/or site in a list attached to the Contract Particulars, Part 1. The consent of the Architect/Contract Administrator is required for any changes (3.1.1).
- The Architect/Contract Administrator may order the removal of the manager from the Project and the Management Contractor must find a suitable replacement (3.3.3) subject to approval by the Architect/Contract Administrator.
- Access for the professional team is assured but subject to restrictions to protect any proprietary rights of the Management Contractor and Works Contractors (3.1).
- The Architect/Contract Administrator is the Principal Designer (CDM Regulations) and the Management Contractor is the Principal Contractor unless other firms are named in Articles 6 and 7.

2 Documents

- The Contract Documents are defined as the Project Drawings, the Project Specification, the Agreement, the Conditions, the Project Cost Plan, Annex A (site facilities), Annex B (services) and (where applicable) the building information modelling (BIM) Protocol. Annex B is particularly important as it defines the services to be provided by the Management Contractor both before and during the construction period.
- A list of definitions is included (1.1).
- The printed Agreement and Conditions prevail over any other Contract Document and any Framework Agreement (1.3).
- The Management Contractor and the Architect/Contract Administrator are each to notify the other if they find any conflict between the Statutory Requirements and the Contract Documents or any further information issued by the Architect/Contract Administrator (2.12.1). The Architect/Contract Administrator must issue an instruction (2.12.2) and the Management Contractor is thereafter not liable to the Employer under the Contract for any non-compliance with Statutory Requirements resulting from the instruction (2.12.3).

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- All notices or other communications, including instructions, are to be in writing (1.7).
- Rights of third parties under the Contracts (Rights of Third Parties) Act 1999 are expressly excluded (1.6).
- There is a bar to assignment of the Contract without written consent (7.1). However, there is an option in clause 7.2 which, if the Contract Particulars state that it is to apply, allows the Employer to transfer a right of action against the Management Contractor to persons with a subsequent interest in the completed Works.

3 Control: time

- The Management Contractor proceeds to construction of the Project only after written notice by the Employer. Following receipt of the notice to proceed, the Management Contractor must enter into Works Contracts so as to ensure that the Project is completed by the Completion Date (2.3.3).
- The Management Contractor is given possession of the site on the date stated, and is required to secure commencement of the Project and ensure regular and diligent progress (2.4).
- The Project may be divided into Sections, with separate dates of possession and completion, in which case full details must be set out in the Contract Particulars.
- Deferment of possession of the site or a section for up to six weeks is possible, subject to an entry in the Contract Particulars (2.5).
- Use or occupation of the site or the Project by the Employer prior to practical completion is provided for (2.6.1).
- Project extensions of time may be awarded to the Management Contractor by the Architect/Contract Administrator (2.19.1). The events or items which are relevant are few in number (2.19) and any extension requires the Management Contractor to have used its best endeavours to prevent delay (2.18.6).
- If the Management Contractor proposes to extend the contract period of a Works Contract, the Architect/Contract Administrator must first be notified and has the right to dissent (2.20).
- Completion of the Project may be on or before the Completion Date (2.4).
- When practical completion of the Project is achieved, it is certified by the Architect/Contract Administrator (2.21).
- If the Management Contractor fails to complete the Project by the Completion Date, the Architect/Contract Administrator issues a certificate of non-completion (2.22).
- The Employer's entitlement to liquidated damages depends on the issue of a certificate of non-completion (2.23).

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- The Contract provides for partial possession by the Employer, subject to the consent of the Management Contractor (2.25).
- The Contract provides for the request from the Management Contractor to provide a quotation to accelerate the work (3.16 and Schedule 6). Using this system, it is possible to establish a completion date earlier than the date stated in the Contract, provided that any quotation is acceptable to the Employer.

4 Control: quality

- The Management Contract allows for work not forming part of the Contract to be carried out by persons directly engaged by the Employer while the Management Contractor still has possession of the site (2.7).
- The Architect/Contract Administrator is to issue drawings, specifications, instructions, etc to the Management Contractor as reasonably necessary to carry out the Project (2.10).
- The instructions might require Project Changes or Works Contracts Variations (3.13). The Architect/Contract Administrator is also to issue instructions about Provisional Sums in Works Contracts (3.15).
- The Architect/Contract Administrator has the power to instruct the Management Contractor to postpone any work (3.14) and to obtain an Acceleration Quotation (3.16).
- The Architect/Contract Administrator shall provide the Management Contractor with information on levels, setting out, etc for the Project (2.9).
- The Management Contractor must comply with the Architect/Contract Administrator's instructions concerning testing (3.17), removal from the site of work not in accordance with the Contract (3.18) and the immediate making good of defective work.
- The Management Contractor is empowered to take action in any emergency to ensure compliance with the Statutory Requirements and, subject to certain conditions, this will be deemed a variation to the Management Contract or a Works Contract, as applicable (2.13).
- Defects to be made good after the Rectification Period must be scheduled by the Architect/Contract Administrator and delivered up no less than 14 days after its expiry (2.30). When the defects have been rectified, the Architect/Contract Administrator issues a Certificate of Making Good (2.31).

5 Control: cost

- The management fee and prime cost are exclusive of VAT and VAT due is to be paid by the Employer as appropriate.

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- Due dates are seven days from the valuation dates. From the Date of Possession, the valuation dates are to be the monthly dates specified in the Contract Particulars (4.7).
- The Management Contractor may, not later than the valuation date, make an interim application to the Quantity Surveyor, stating the sum that it considers to be due at the relevant due date and the basis on which the sum was calculated (4.11.1).
- The Architect/Contract Administrator is to issue an Interim Certificate within five days of each due date, stating the amount due to the Management Contractor on the due date and the basis for its calculation. Each Interim Certificate is to be accompanied by a statement specifying the amounts in respect of each Works Contractor (4.10.1, 4.10.2).
- The Interim Certificate is to be prepared in accordance with clause 4.9 and should include any amount deducted as retention, cumulative total of any advance payments that have become due for reimbursement in accordance with the Contract Particulars, sums stated in previous Interim Certificates and any sums paid in respect of Payment Notices.
- If the Architect/Contract Administrator fails to issue an Interim Certificate as set out above, the Management Contractor is entitled to issue a Payment Notice to the Quantity Surveyor at any time after the expiration of the five-day period, stating the sum that it considers to be due and the basis for its calculation (4.11.2).
- The final date for payment is 14 days from the due date (4.12.1). However, the final date will be postponed where the Management Contractor serves an Interim Payment Notice by the number of days after the last date for issue that it took the Management Contractor to issue the notice (4.12.4).
- The sum to be paid, subject to any Pay Less Notice, shall be the sum stated on the Payment Certificate or Payment Notice (4.12.2).
- Subject to a Pay Less Notice, the Employer is to pay the sum stated on the certificate or notice (as appropriate) on or before the final date for payment (4.12.2).
- The Employer may, not later than five days before the final date for payment, issue a notice of its intention to pay less to the Management Contractor – stating the sum it considers due to the Management Contractor at the date of the notice and how it was calculated. When a Pay Less Notice is issued, the amount to be paid on the final date for payment shall be the amount stated therein (4.12.5).
- Any late payment shall attract interest (4.12.6) and the Management Contractor is entitled to suspend some or all of its obligations following the service of the requisite seven-day notice (4.12.7). Reasonable expenses of such suspension will be paid by the Employer (4.14).

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- There are detailed provisions for the final certificate (4.17), and the procedures mirror the certification process for interim payments described above. The final date for payment is 14 days from the due date.

6 Insurance

- The Management Contractor indemnifies the Employer in respect of personal injury or damage to property other than the actual Works (6.1 and 6.2). This is to be backed by insurance (6.4).
- If instructed, the Management Contractor is to take out joint names insurance for the Employer against the risk of legal nuisance. There is a list of exceptions and damages must not be directly attributable to any negligence by the Management Contractor or Works Contractors. An entry in the Contract Particulars stating the necessary amount of cover is required (6.5.1).
- Where Option A is to apply, insurance of 'the Project' (ie work executed and Site Materials) is to be taken out by the Management Contractor in joint names (ie including the Employer's name) for the full reinstatement value of the Project against all risks. This must be done before any work begins on site.
- Where insurance Option B is to apply, the requirement to take out such insurance rests with the Employer.
- In the event that terrorism cover is withdrawn and is no longer available, the situation and options open to the Employer are dealt with in clause 6.11.
- Where insurance Option C is to apply, and the Project comprises alterations of or an extension to existing structures, then the Employer is required to take out a joint names policy in respect of the existing structures and contents. This is to be for the full cost of reinstatement, etc in the event of loss due to Specified Perils.
- An entry in the Contract Particulars will show whether the Joint Code of Practice on Fire Prevention on Construction Sites is to apply (6.18 and 6.19) and, if so, both the Employer and the Management Contractor must comply with it.

7 Termination

- The Employer is allowed to terminate the employment of the Management Contractor at will (8.4). This may, of course, happen either before or during the Construction Period.
- The Employer is allowed to terminate the employment of the Management Contractor for reasons of default (8.5). A warning notice may be issued by the Architect/Contract Administrator but the notice of termination is a matter for the Employer.
- The Management Contractor is allowed to terminate its own employment for reasons of default by the Employer (8.10).

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- Either Party can terminate the employment of the Management Contractor for listed neutral causes (8.12).
- The respective rights and duties of the Parties concerning payment, removal and completion are set out in detail (8.8 and 8.13).

8 Dispute avoidance and resolution

- Part II of the Housing Grants, Construction and Regeneration Act 1996 gives either party a statutory right to refer any difference or dispute arising out of the Contract to adjudication. Article 10 provides for this.
- Procedures for referral to adjudication, the appointment of an adjudicator and the powers and conduct of the adjudicator are set out (9.2).
- Article 11 establishes arbitration as the agreed method for final determination of disputes (9.3–9.8), provided this has been selected in the Contract Particulars. If it has not, disputes will be finally determined by legal proceedings (Article 12).

This contract?

If considering using MC16, the following points should be borne in mind.

It is intended for use where the employer has appointed a contract administrator, a quantity surveyor and other advisers to make up a professional team, and the team has prepared project drawings and a project specification and, later, detailed drawings, specifications and bills of quantities for works packages. The works contractors enter into contracts directly with the management contractor. JCT MC16 is not a lump sum contract and the sum paid by the employer to the management contractor is the prime cost of the work, together with a management fee.

When completing the form, decisions are required relating to: deferment of possession; insurance of the project; liquidated damages; acceleration; management fee; Joint Fire Code; and BIM Protocol. The five schedules should also be checked for completeness of entries.

Acting as contract administrator entails dealing directly with the management contractor, who in turn will be involved in the administration of conditions in the works contracts. There are, nevertheless, some instances when the contract administrator will be involved with the works documents, and the procedural rules need to be meticulously observed as they can become complicated.

MC16 is a relatively high risk contract with imprecise cost and time elements initially. It depends on goodwill and a high degree of trust between the employer, the professional team and the management contractor.

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References and further reading

JCT Management Building Contract 2016
JCT Management Building Contract Guide 2016
JCT Management Works Contract 2016
JCT Management Works Contractor/Employer Agreement 2016

Powell-Smith, V. and Sims, J. *The JCT Management Contract: A Practical Guide*, Kluwer Publishing (1988)

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Construction Management Appointment 2016 (CM/A16)

CM/A16 is for use by a client wishing to appoint a construction manager to provide services in connection with a project to be procured under a construction management arrangement. It is intended to be used in conjunction with the JCT Trade Contract (CM/TC), which provides for direct engagement by the employer of separate trade contractors to undertake packages of work, let on a rolling programme basis.

Background

The fundamental distinction between management contracts and construction management lies in the degree to which the employer accepts a direct contractual relationship with the contractors who carry out the work packages. With management contracting, this will be achieved though the management contractor and there will also be an independent team of professionals, including an architect/contract administrator and quantity surveyor with overall responsibility for design and contract administration.

With construction management, the construction manager will be the key person or firm with an overall responsibility for coordination and contract administration relating to the trade contracts. The employer also has a significant contribution to make and is responsible for the engagement of a consultant team and the nomination of a consultant team leader. The consultant team will be heavily involved during the pre-contract period and, although it is also likely to have some involvement during the construction period, this will not be in contract administration.

In July 1995, the JCT produced draft documentation for construction management. This was referred to the constituent bodies of the JCT but was then overtaken by the publication of the Latham Report and Part II of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA). The draft was developed to take account of the full implications of these, and the construction management documentation eventually appeared in 2002. The 2011 edition of the contract was published primarily to bring the contract into compliance with the amendments to the HGCRA.

The key 2016 changes can be summarised as follows:

- incorporation and updating of provisions from the JCT Public Sector Supplement
- changes relating to fair payment principles, transparency and building information modelling (BIM)
- amendments relating to the CDM Regulations 2015

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- inclusion of references to various provisions of the Public Contracts Regulations 2015
- changes relating to payment, designed to reflect fair payment principles and to simplify and consolidate the payment provisions
- provision for monthly payments, including during the rectification period
- tightening up of the arrangements to secure provision of third party rights/warranties from subcontractors
- simplification and rationalisation of drafting in many areas; for example, calculation of amounts due and provisions for rectification following damage covered by insurance.

Structure

The JCT documentation for construction management consists of an agreement (CM/A) between the employer and the construction manager and a trade contract (CM/TC) between the employer and each of the trade contractors, together with warranties by a construction manager and by a trade contractor to a purchaser or tenant and funding organisation for the project (CMWa/P&T, CMWa/F, TCWa/P&T and TCWa/F). There is also a Guide, which includes model schedules of construction manager services, site facilities and services, and cost planning and control.

CM/A16 is an attractively presented document, logically structured and with particularly clear layout, making referencing relatively straightforward.

There are six recitals, the first of which refers to the employer having appointed or intending to appoint a consultant team. The fifth recital references a framework agreement and the sixth refers to optional supplemental provisions.

There are seven articles, which refer briefly to the obligations of the construction manager and the employer, the identity of the principal designer and principal contractor, and the methods for resolving disputes. The conditions are relatively short and follow the usual section-headed sequence of the larger JCT forms.

Probably the most significant parts of the document are the schedules (taking up 16 pages in total). These act as reference points for much of what is carried in the conditions and are structured as follows:

Schedule 1: Definition of Reimbursable Cost
Schedule 2: Insurance
Schedule 3: Third Party Rights
Schedule 4: Consultant Team – Terms of Engagement
Schedule 5: Construction Manager's Services
Schedule 6: Site Facilities and Services
Schedule 7: Cost Planning and Control
Schedule 8: Supplemental Provisions.

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The supplemental provisions cover: collaborative working; health and safety (eg ensuring this is treated as being of 'paramount concern' to all parties); cost saving and value improvement proposals by the construction manager; sustainable development and environmental considerations; performance indicators and monitoring; notification and negotiation of disputes; transparency (the Freedom of Information Act 2000); and compliance with the Public Contracts Regulations 2015.

Use

The nature of construction management procurement makes it likely to be of interest only for major building works undertaken by experienced client bodies. Although the construction manager is largely responsible for the management and coordination of trade contractors, this still leaves the client with considerable executive responsibility on a day-to-day basis for the duration of the pre-construction and construction stages of the project.

In the contract particulars, part 2, the employer is to name the consultant team leader and other team members, which may include a cost consultant, and to summarise the scope of the work of each member of the consultant team. The team's terms of engagement are to be set out in Schedule 4. Clause 2.10 sets out the employer's duties with respect to appointing the team and outlines its role. A copy of the employer's initial brief and the preliminary project cost plan will be developed into the project brief and the project cost plan.

Synopsis

1 Roles

- The Construction Manager is to manage the procurement of the Project in accordance with the Project Brief, Project Cost Plan and the Construction Phase Plan (2.1).
- The Construction Manager must provide the services set out in Part 1 of Schedule 5 and, subject to clause 5.1, provide additional services and provide the site facilities in Schedule 6 (2.1).
- The Construction Manager must exercise skill, care and diligence to the extent expected of a reasonably competent construction manager (2.7) and must carry professional indemnity insurance as indicated in the Contract Particulars (6.16).
- The Construction Manager is not liable to the Employer for the design of the Project (2.8).
- Each Party undertakes to the other to comply with the CDM Regulations (3.5). In particular, where the Construction Manager is not the Principal Contractor and/or the Principal Designer, the Employer must ensure that those appointed to those roles carry out their duties (3.5.1).

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- Where the Construction Manager is the Principal Designer, it must ensure that the health and safety file is delivered to the Employer (3.5.2).
- The Construction Manager must comply with regulations 8 and 15 and, when it is the Principal Contractor, with regulations 12 to 14 (3.5.3).
- The Employer may appoint an Employer's Representative to handle all functions ascribed to the Employer (1.1 and 3.1).
- The Employer will appoint the Consultant Team (First Recital), name the Consultant Team Leader and may appoint a Cost Consultant (1.1 and the Contract Particulars).
- The Employer will appoint the Trade Contractors, after receiving recommendations from the Construction Manager and, where relevant, from the Consultant Team Members (3.3).
- The Construction Manager may appoint personnel and any changes require the consent of the Employer (2.2).
- The Construction Manager cannot sub-contract its obligations without the Employer's written consent (3.4).

2 Documents

- The term 'contract documents' is not defined. Documents referred to include the Preliminary Project Cost Plan, the Project Brief, Project Cost Plan, Project Drawings, Project Programme and Project Specification (1.1). With the exception of the programme, the Employer is required to engage a Consultant Team to prepare this information and provide it to the Construction Manager (2.10.1).
- Further drawings, specifications, details and schedules will be provided as necessary to explain or amplify the project information (2.12).
- The Trade Contracts will be on the current JCT Construction Management Trade Contract (CM/TC) unamended, unless otherwise agreed with the Employer (3.3.2).
- A list of definitions is included (1.1).
- The Contract and Conditions prevail over any other document referred to in the Contract (1.3).
- All notices or other communications, including instructions, are to be in writing (1.7).
- Rights of third parties under the Contracts (Rights of Third Parties) Act 1999 are expressly excluded (1.6).
- Neither Party to the Contract may assign the Contract without written consent (7.1).
- The Contract is to be construed in accordance with the law of England (1.10).

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3 Control: time

- The Contract refers to the services provided as relating to a pre-construction period and a construction period.
- There is no start and completion date with this agreement, as found with traditional forms, and the construction period runs from the date of commencement of work on site by the Trade Contractor first on the scene and ends with the date of issue of the Project Completion Certificate for the last of the Trade Contracts (2.3.2).
- It is envisaged that the Works may be divided into Sections, although the Sections, and their respective commencement and completion dates, are not set out in the Contract Particulars.
- Possession and control of the site is given to the Construction Manager from the date that the Site Facilities are first provided or the date on which the first Trade Contract starts to the date of the Project Completion Certificate or relevant Section Completion Certificates (2.13).
- There is provision for the employer to use or occupy the site or the Project before completion (2.14).
- There is provision for takeover or occupation of part of the Project by the Employer before completion, provided the consent of the relevant Trade Contractors has been obtained (2.15).
- There will be a Project Programme prepared by the Construction Manager during the pre-construction period, which will be agreed and signed off by the Employer and the Consultant Team (1.1).

4 Control: quality

- The Construction Manager is obliged to manage the procurement of the Project in accordance with the Project Brief (2.1). This obligation is qualified as an obligation to use reasonable skill and care; there is no absolute obligation to deliver a project that complies with the brief.
- All the details regarding the exact standard of work to be provided will be set out in the Trade Contract documents.
- The Employer may issue to the Construction Manager such instructions in writing as are reasonably necessary (3.2.1).
- The Construction Manager will certify practical completion in respect of each Trade Contract (2.3.1). The rectification periods for each Trade Contract will begin at the date of practical completion.
- When defects in work carried out under a Trade Contract have been made good, the Construction Manager will issue a Certificate of Making Good in respect of that contract (2.4).

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- After completion of the last Trade Contract, the Construction Manager will issue the Project Completion Certificate (2.3.2).
- When the Construction Manager advises the Employer that all obligations under the Trade Contracts have been fulfilled, the Employer will issue the Final Certificate (2.6).

5 Control: cost

- The Employer undertakes to pay to the Construction Manager the Reimbursable Cost and the Construction Management Fee (4.1).
- The Reimbursable Cost is costs incurred in accordance with Schedule 1 (1.1), which sets out all chargeable site management and attendance costs.
- The Construction Management fee comprises the management fees for the pre-construction and the construction periods (1.1). This sum, exclusive of VAT, can be adjusted if circumstances change (5.1 and 5.2).
- The Construction Manager shall submit interim accounts to the Employer at monthly intervals stated in Contract Particulars and each interim account shall state the amount that the Construction Manager considers to be due and the basis for the calculation (4.2).
- The due date for each payment shall be the later of the date of receipt of the account from the Construction Manager or the monthly date specified in the Contract Particulars (4.3.1).
- The Employer is to issue a payment notice within five days of each due date, stating the amount that it considers to be due to the Construction Manager on the relevant due date and the basis for calculating the amount (4.3.2).
- The final date for payment is 14 days from the due date (4.6.1). Subject to a Pay Less Notice, the Employer is to pay the sum stated on the Payment Notice on or before the final date for payment (4.6.2).
- The Employer may, not later than five days before the final date for payment, issue a notice of its intention to pay less to the Construction Manager stating the sum that it considers to be due to the Construction Manager and how it was calculated (4.6.4).
- A procedure for notification of the final payment is set out (4.5) and the payment procedure is the same as that for interim payments, except that the amount may be a balance due to the Employer and the Pay Less Notice may be issued by the Construction Manager (4.6.4.2).
- Any late payment shall attract interest on the amount owing (4.6.8) and the Construction Manager is entitled to suspend some or all of its obligations upon service of the requisite seven-day notice. Reasonable expenses of such suspension will be paid by the Employer (4.7).

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6 Insurance

- The Construction Manager is to indemnify the Employer against claims relating to personal injury and death under the contract, and against damage to property, real or personal, other than the Project, provided the claims and damage are caused by the carrying out of its obligations and to the extent that it is negligent (6.1 and 6.2). Note that this liability and duty to indemnify is significantly more restricted than that under, for example, SBC16; among other things it does not refer to the consequences of the carrying out of the works, but to the Construction Manager's negligence in undertaking its obligations.
- The Construction Manager must take out insurance in respect of claims for personal injury or damage to property for the sum entered in the Contract Particulars (6.6). The liability of the Construction Manager is limited to that sum (6.6).
- Insurance of the Project will be taken out by the Employer under a joint names policy for all risks cover, for the full reinstatement value of the Project and replacement value of site facilities, plus the amount entered in the Contract Particulars for professional fees. Where the Project comprises work to existing structures, cover must include the contents owned by the Employer, but this policy will be only in respect of damage due to Specified Perils (Schedule 2, item 2).
- The Construction Manager is required to take out professional indemnity insurance for an amount entered in the Contract Particulars (6.16).

7 Termination

- The Employer may terminate the engagement of the Construction Manager at will, but not unreasonably or vexatiously (8.4.1 and 8.2.1).
- Termination may be by the Employer in the event of the Construction Manager's insolvency or failure to exercise the degree of skill, care and diligence required under clause 2.7 (8.4.2 and 8.4.3).
- The Construction Manager may terminate its own engagement in the event of the Employer's failure to pay amounts properly due, the Employer's insolvency or if work is suspended for a continuous period of six months (8.5).
- The consequences of termination are set out in detail (8.6).

8 Dispute avoidance and resolution

- The Parties are required to give serious consideration to any request of the other to use mediation to resolve any dispute (9.1).
- Article 5 confirms the right of either Party to seek adjudication in the event of a difference or dispute. Adjudication will be under the statutory Scheme for Construction Contracts (England and Wales) Regulations 1998 (9.2).

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- The Adjudicator can be named, or a nominating body selected, in the Contract Particulars (9.2). If none is named/selected, the Parties can apply to any of the adjudicator-nominating bodies listed in the Contract Particulars.
- Final determination will be by the English courts unless the Contract Particulars show that clause 9.3 (Arbitration) is to apply.
- Where arbitration applies, appropriate deletions in the Contract Particulars will indicate the appointors of an arbitrator. The conduct of the arbitration and effects of the award are covered in clauses 9.3 to 9.7. The arbitration will follow the Construction Industry Model Arbitration Rules (CIMAR).
- Where arbitration is selected, each Trade Contract must similarly provide that disputes may be resolved by arbitration and CIMAR rules 2.6, 2.7 and 2.8 relating to joinder of disputes will apply (9.5).

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This contract?

If considering using CM/A16, the following points should be borne in mind.

It is intended for use with large projects where the employer wishes to enter into separate contracts with members of the consultant team, who will be responsible for design, the construction manager, who will provide services during both the pre-construction period and the construction period, and each of the trade contractors, who will carry out and complete the works. The employer assumes the central role, although an employer's representative and a cost consultant may also be appointed. This is not a lump sum agreement (although the trade contracts may be) and the employer will pay the construction manager reimbursable costs and a management fee.

The contract is available in one version only and is the head contract in a standard construction management suite of documents. The conditions apply to both the pre-construction and construction periods. The conditions include provisions for completion in sections and partial possession.

When completing the form, decisions are required in relation to: preparing the project cost plan; insurance cover, including professional indemnity insurance; limitation of liability; any amendments to the standard trade contracts; reimbursable costs; and payments to the construction manager during the pre-construction period. The schedules are a particularly important part of the contract and should be checked for content and completeness of entries.

If acting as design consultant, remember that the construction manager may also advise the employer in preparing the project brief, make recommendations and review design and other drawings. A close working relationship with the consultant team is essential.

If acting as employer's representative, then remember that this could involve carrying out all the functions ascribed to the employer, acting as agent unless the employer notifies the construction manager otherwise.

Clearly, this is an arrangement which will appeal only to an experienced employer, probably with in-house services. It is relatively low risk for the construction manager. CM/A16 has the merit of being logically structured, clearly laid out and of taking just over 70 pages to cover a very sophisticated operation.

The form is not for use in Scotland and the Scottish Building Contract Committee has decided not to publish a Scottish version.

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References and further reading

JCT Construction Management Appointment (CM/A) 2016
JCT Construction Management Trade Contract (CM/TC) 2016

JCT Trade Contractor Collateral Warranty for a Purchaser or Tenant (TCWa/P&T) 2016
JCT Trade Contractor Collateral Warranty for a Funder (TCWa/F) 2016

JCT Construction Management Guide (CM/G) 2016

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Measured Term Contract 2016 (MTC16)

The Measured Term Contract (MTC16) is a contract for traditional procurement (there is no reference to contractor design), intended for regular repair and improvement work. No particular project is identified at the time the contract is let. Instead, the contractor submits prices for the type of work that may be required and the employer issues a works order whenever work is required.

Background

The Measured Term Contract was introduced in 1989 for use by employers in both public and private sectors who have building stock in need of planned regular maintenance and minor improvement work. It is obviously tiresome and wasteful having to enter into separate contracts for each small job, and in some cases a contractor might be needed to undertake repair work at short notice. In all such circumstances it is usually preferable to deal with one contractor appointed to handle all such work under a single contract for a specific period, on terms previously agreed. MTC16 allows for the appointment of a contractor on agreed rates for a period of time so that, whenever specific work is needed, the contractor can be required to undertake this by means of a works order.

Competitive tenders may be invited on the basis of rates, taking into account the nature of the intended works, the geographical area to be covered and the duration of the contract. MTC16 offers a flexible medium- to long-term agreement and is generally appropriate for contract periods of one year or more. It contains optional provisions for the revision of rates and also contains a break clause. Under this contract, orders are placed on an agreed basis and the contractor fulfils them, with payments calculated on a schedule of rates or a schedule of hourly rates. The contract offers flexibility to the employer because it does not create exclusivity over its projects and does not hold it contractually to a minimum number of orders.

Structure

The total document is over 49 pages long and contains a contents table, articles of agreement with five recitals and eight articles, contract particulars, an attestation and conditions set out under nine section headings, all following the pattern of other JCT forms, such as SBC16. The contract contains eight optional supplemental provisions.

The first recital refers to the nature of the intended work as being ‘maintenance and minor’, and there is no reference to the contractor undertaking any design. It also requires the ‘Contract Area’ to be defined. The employer is required to appoint a contract administrator, a person who has special significance under this contract

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because each separate job within the period of the contract must be initiated by an order issued by the contract administrator.

The second recital embodies the offer by the contractor to carry out work under the contract on the agreed terms of payment set out by the contract administrator, and acceptance of this offer by the employer. The fourth recital refers to the contractor having supplied the employer with a safety policy that complies with statutory requirements.

Details should be given of the types of work for which orders may be issued, a list of properties in the contract area, which may be included within the contract, and an indication of the estimated value of work which may be anticipated (although not guaranteed). There is an opportunity to assign a priority code to each anticipated order, for example an 'A' code could require a response within four hours. The duration of the contract period, which will normally be for a minimum of one year, should also be entered. The terms for measurement, valuation and payment are under items 10 to 14 of the contract particulars.

By nature, MTC16 differs from a lump sum contract in that there can be no precise amount of work established at the outset and no contract sum. It is an enabling document, which allows for the issue of specific orders over a given period, to be valued according to rates, prices and percentages, as entered in the contract particulars.

Use

After the identity of the parties and the date of the agreement, the recitals require an entry which defines the 'Contract Area'. There is no reference to drawings or documents other than the accepted terms of payment. The contract administrator must be named under article 3. The term 'architect' is not used at all in the contract.

The form can be executed under hand and not as a deed, or as a deed.

The contract particulars require an entry stating the minimum and maximum value of any one order to be issued, together with an approximate total figure or figure per annum. A priority coding for orders may be introduced, which would signal the need for rapid response by the contractor to specific orders, such as emergency repairs within stipulated minimum periods.

Note that for payment it is necessary to identify whether payment is based on the National Schedule of Rates or some other schedule of rates. The contract can be fixed price as far as rates are concerned or subject to fluctuations. MTC16 incorporates changes to payments and payment certificates introduced by the amendments to the Housing Grants, Construction and Regeneration Act 1996 (HGCRA).

Responsibility for measurement and valuation can rest with either the contractor or the contract administrator. The contract particulars should indicate whether the contractor is to undertake all measurement and valuation or, conversely, whether

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the contract administrator is to be responsible. Alternatively, it can be shown that only orders above a stated value will be the responsibility of the contract administrator for measurement and valuation.

With a contract of relatively long duration, it is desirable that there should be a break provision. The period of notice required to bring this about is 13 weeks, unless a different period is entered in the contract particulars.

Synopsis

1 Roles

- The Parties to the Contract are the Employer and the Contractor. A Contract Administrator is identified in Article 3 and any replacement needed must be nominated within 14 days. The Contract Administrator's role includes issuing each order for work and may include assessing the value of each Order.
- The Contractor is obliged to carry out work only when issued with an Order. The Order can relate to any property listed in the Contract Particulars, within the defined Contract Area (ie geographic location) and be for any type of work as set out in the Contract Particulars. The Order will define the location, scope and timing of the specific work to be carried out.
- The Contractor does not have an exclusive right to all work within the Contract Area and the Employer can use other contractors or its own labour force if desired (2.3.1). The Contractor may only sub-contract work with prior consent of the Contract Administrator (3.2).
- The Contractor must comply with all Statutory Requirements and give all required notices (2.1). It is entitled to recover fees and charges not otherwise provided for in the Schedule of Rates (2.9). These duties arise in respect of any work undertaken in response to an Order.
- The respective obligations of the Employer and the Contractor, with regard to the CDM Regulations applying to an Order, become contractual as well as statutory duties (3.9).
- The Contractor is obliged to employ a competent representative (3.3). (Note: there is no reference to the representative being constantly or otherwise on site.)
- The Contract Administrator is the Principal Designer (in relation to the CDM Regulations 2015) and the Contractor is the Principal Contractor unless other firms are named in Articles 4 and 5.
- An Order, although issued, may be cancelled in writing by the Contract Administrator. The Contractor will be entitled to direct costs already incurred (3.6).
- The Contract includes break provisions, which allow for termination of the Contractor's employment by either Party after six months. Such action could become

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necessary on a long-running contract because of changes to the Employer's building programme or due to a fluctuating workload. Thirteen weeks' notice (or a lesser period if previously agreed) is required (7.1).

2 Documents

- The Contract Documents are defined as 'the Agreement, these Conditions, the Schedule of Rates and (where applicable) the BIM Protocol'. No drawings or documents describing the scope or quantity of work would normally be issued at tender stage, nor would they form part of the Contract. Such documents would be issued by the Contract Administrator with each Order.
- The definitions in this Contract have a particular significance, because of their context (1.1).
- The printed Agreement and Conditions prevail over any other Contract Document, and also take precedence in the event of any conflict with any specification or drawings issued as part of an Order (1.2).
- The Contractor is to notify the Contract Administrator if it finds any conflict between the Statutory Requirements and an Order. The Contract Administrator must issue an instruction, which will be a Variation. The Contractor is then not liable for non-compliance resulting from the Order or a subsequent Variation (2.8).
- All Orders, notices or instructions are to be in writing (1.6.1).
- Rights of third parties under the Contracts (Rights of Third Parties) Act 1999 are expressly excluded (1.5).
- The bar to assignment without written consent extends to the Contract or any part share or interest (3.1). Sub-contracting in any Order is restricted to the extent that prior consent in writing of the Contract Administrator is required (3.2).

3 Control: time

- The duration of the Contract and its starting date are entered in the Contract Particulars (item 3). This would typically be for a period of between one and three years.
- The Contract Particulars can set out a series of priority codes to apply to works orders, for example an 'A' code could require response within four hours and completion within 48 hours.
- Unless an Order identifies a priority code, it must set out the starting date and reasonable completion date for the work included in the Order (2.6).
- Access to the site, which can be a complicated issue in work of this nature, lays a considerable burden upon the Contract Administrator. The Contractor is obviously entitled to a degree of possession sufficient to enable it to carry out the work under any Order. Where access is restricted, unproductive time may be charged on a daywork basis (3.4).

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- A programme must be provided by the Contractor where the Contract Administrator requests one (2.7). Once a Variation is issued, the Contractor must issue a revised programme within a reasonable period of time (note that this is not a requirement in other JCT forms, such as SBC16).
- Where matters beyond the control of the Contractor cause delay, or the Contractor validly suspends its obligations under clause 4.7, an extension to the time for completion of an Order may be given by the Contract Administrator on a fair and reasonable basis (2.10).
- There is no provision for liquidated damages. If the Contractor finishes later than the date specified in an Order, the Employer would need to claim damages by means of adjudication or another dispute resolution process.

4 Control: quality

- The Contractor is obliged to carry out work when issued with an Order. The work is to be executed in a proper and workmanlike manner, in accordance with the Contract Documents, empowered instructions and the Construction Phase Plan (2.1).
- The Contractor must use goods, materials and workmanship of the standard specified in the Order or, if not so specified, in the Schedule of Rates (2.2.1). Where these are not specified in either document, nor stated to be for the approval of the Contract Administrator, they must be of a standard appropriate to the works (2.2.3).
- The Employer has the right to supply any materials, plant or equipment needed for carrying out work and the Contractor will have responsibilities concerning these (2.3).
- If supplied by the Employer, materials and goods are to be of the kinds set out in the Schedule of Rates, and the Contractor is not liable for any losses resulting from any failure of such items to comply (2.3.6).
- Variations may be instructed by the Contract Administrator and what constitutes a Variation under this Contract is defined (3.5).
- The Contract Administrator has the power to order the exclusion of any person from the Site (3.7).
- If the Contractor does not comply with written instructions from the Contract Administrator, then, after proper notice, other persons may be brought in by the Employer to give effect to the instruction at the Contractor's expense (3.8).
- The Contractor is required to make good any defects appearing within six months of the Order Completion Date (2.12).

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5 Control: cost

- The work covered by each Order is subject to measurement and valuation in accordance with the agreed Schedule of Rates (5.2 and 5.3.1). If daywork is the appropriate basis, the Schedule of Hourly Charges is used to value the Order (5.4.1).
- Where neither the Schedule of Rates nor daywork are appropriate, the value is based on rates and prices that may be fairly deduced from these documents. In the event that agreement is still required, this shall be between the Parties or, as a last resort, it shall rest with the Contract Administrator, who must consult with the Contractor (5.5).
- If the Contractor's progress is interrupted because of an instruction issued by the Contract Administrator, then agreed lost time or other unproductive costs are valued on a daywork basis (5.8).
- Responsibility for measurement and valuation rests with the person designated in the Contract Particulars item 11, which could be the Contractor or the Contract Administrator (5.2). If no person is selected, it is the responsibility of the Contract Administrator. It is possible to set a value limit whereby, in the case of orders below an estimated value, responsibility rests with the Contractor. Above this figure, unless there is anything stated to the contrary, responsibility will rest with the Contract Administrator.
- Most work carried out under an Order will be subject to Part II of the HGCRA, and the Contract provisions relating to payment take account of this.
- Progress payments shall apply where any Order comprises work estimated to take more than 45 days to complete or the total value of the Order is above the amount entered in the Contract Particulars as the cap amount (where no amount has been stated, the default position is any amount above £2,500) (4.3.1).
- Where progress payments apply, the Contractor is to make application for payment to the Contract Administrator not later than each Valuation Date stated in the Contract Particulars (if none is stated it is the last day of each month). The application should state the amount that the Contractor considers will become due at the Valuation Date and the basis of calculation and provide all information specified in the Contract Documents (4.3.1).
- The due date for a progress payment is seven days after the relevant Valuation Date (4.3.2).
- The Contract Administrator shall, not later than five days after the due date, issue a certificate stating the amount due to the Contractor on the relevant due date and the basis on which it was calculated (4.3.3).
- There are two options for a valuation of the final payment, either the Contract Administrator measures or values the Order or the Contractor is in charge of valuation. The Parties make this choice in the Contract Particulars.

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- Where the Contract Administrator does the valuation, the due date is 28 days from the Order Completion Date, where there are no progress payments, and 51 days from the Order Completion Date, where progress payments are included (4.4.1). The Contract Administrator, not later than five days after the due date, is to issue a certificate stating the total sum it considers to be due to the Contractor for the completed Order, less any amounts previously certified and any payments made in pursuance of the Contractor's payment notice and stating the basis on which the sum has been calculated (4.4.2). If the Contract Administrator does not issue a certificate in accordance with 4.4.2, the Contractor may make an application for payment stating the amount it considers due and the basis for the calculation (4.4.3).
- Where the Contractor is to value the Order, the Contractor shall, after the Order Completion Date, make an application to the Contract Administrator, stating the sums that the Contractor considers are due and the basis on which they were calculated (4.5.1). The due date for payment is seven days after the next monthly Valuation Date. No later than five days after the due date, the Contract Administrator shall issue a certificate stating the sums that it considers to be due to the Contractor and the basis on which they were calculated (4.5.2). If the Contractor fails to make an application within 56 days after the date for Completion of the Order, the Contract Administrator may at any time give the Contractor notice that an application should be made within 28 days, failing which the Contract Administrator shall arrange for valuation (4.5.3).
- Where the Contractor fails to make an application within the notice period set out in 4.5.3, the Contract Administrator shall arrange for valuation and the due date for payment shall be 35 days from the expiry of the date for the Contractor to make an application. Not later than five days after the due date the Contract Administrator shall issue a certificate stating the amount due (including deductions of the amount spent on hiring independent valuation services) and the basis on which it was calculated (4.5.4).
- If the Contract Administrator fails to issue the certificate as required in any of the previous paragraphs, the Contractor may, at any time after the expiration of the five-day period, make an application stating the amount it considers due and the basis for the calculation (4.5.5).
- The final date for payment of all amounts under 4.3 (progress payments) and 4.5 (final payments) is 14 days from the relevant due dates (4.6.1). The final date for payment will be extended where the Contractor has to make an application on the failure of the Contract Administrator to issue a certificate. The extension covers the same number of days that it took the Contractor to make its application on the expiry of the five-day period (4.6.4).
- Subject to the Employer issuing a notice of its intention to pay less than the stated sum, the amount to be paid at the final payment date will be the sum stated in the relevant certificate or payment application, where the latter applies (4.6.2).

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- If the Employer intends to pay less than the amount stated in the certificate or application, the Employer is to issue a notice to the Contractor stating the amount it considers due to the Contractor on the date of the notice and the basis on which it was calculated. The sum on the notice becomes payable on the final payment date (4.6.5).
- Interest is payable on any amount outstanding after the final date for payment (4.6.6) and the Contractor reserves the right to suspend some or all of its obligations if non-payment persists after a seven-day notice following non-payment on the final date for payment. Where the Contractor exercises this right, the Employer shall be liable for all reasonable costs arising from such suspension (4.7).

6 Insurance

- The Contractor is to indemnify the Employer in respect of death or injury to persons or damage to property other than the Works, which arises from carrying out an Order (6.1 and 6.2). This indemnity is to be backed by insurance, and an entry against item 15 of the Contract Particulars will state the minimum cover required.
- Insurance of existing structures and contents which might be affected by an Order is the responsibility of the Employer (6.7A). Cover will be for the full cost of reinstatement, repair or replacement after loss or damage due to one or more of the stated perils. Where the Employer does not wish to insure the existing structures, amendments will need to be made to the form, which should be agreed between the Parties prior to entering into the Contract.
- All Risks Insurance of work or supply instructed under Orders is the responsibility of the Contractor (6.7B). It will most likely be covered by an annual all risks policy, but this must be a joint names policy. Cover for each Order is required up to the end of the Contract Period or, if later, the last Order Completion Date.
- There are extensive terms relating to terrorism cover (6.11 and 6.12).

7 Termination

- The Employer is allowed to terminate the employment of the Contractor for given reasons (8.4). Termination will affect the Contract as a whole, although the default may arise only in respect of an Order. The clause refers to work being 'materially' suspended, disrupted or delayed, and minor or trivial instances would be excluded (8.4). A warning notice by the Contract Administrator is required before the actual notice of termination by the Employer. In the case of insolvency, termination is not automatic, but the Employer may terminate immediately without a warning notice (8.5.1).
- The Contractor is allowed to terminate its own employment for stated reasons, which include failure by the Employer to pay amounts properly due by the final date for payment (8.7).

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- Common law rights are preserved whether termination is by the Employer or the Contractor and the grounds stated in the Contract are without prejudice to any other rights or remedies (8.3.1).
- The respective rights and duties of the Parties concerning outstanding payments and any direct loss and/or damage arising from termination are set out in detail (8.10 and 8.11).

8 Dispute avoidance and resolution

- Either Party has a right to refer any dispute or difference arising under the Contract to adjudication (Article 6 and clause 9.2).
- Where Article 7 is stated to apply, arbitration is the agreed method for final determination of disputes. Written notice of reference is required (9.4.1).
- The conduct of the arbitration and the powers of the arbitrator are clearly defined (9.3 and 9.5). The Parties agree that there may be appeal to the courts (9.7).
- MTC16 has adopted the 2016 JCT edition of the Construction Industry Model Arbitration Rules and the provisions of the Arbitration Act 1996 shall apply.
- Unless it is stated that Article 7 applies, then the final determination of disputes is to be by legal proceedings and not by arbitration (Article 8).
- There is a reference in clause 9.1 to 'mediation'. This means of resolving disputes may be particularly appropriate to the relatively low cost and short duration of work carried out under individual Orders. It will not remove the statutory right to adjudication or a contractual agreement to arbitration or legal proceedings.

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JCT MTC16

This contract?

If considering using MTC16, the following points should be borne in mind.

It is intended for maintenance and small works programmes of between one and three years' duration, and the approximate value of work to be carried out is given as a sum either per annum or relating to the contract period. There is only one version for both private and public sector use. The employer is required to appoint a contract administrator. The form avoids the need for numerous separate contracts, but the appointed contractor may only carry out each separate job when initiated by an order issued by the contract administrator.

The applicable law of the contract is the law of England, and the form may be used as printed for work in England and Wales. A footnote to clause 1.7 refers to its use under other laws.

The form includes break provisions, commencement and completion of orders, arrangements for site access and cancellation of an order. Orders are subject to a minimum and maximum value, as entered in the contract particulars. Contract documents comprise the articles, conditions and schedule of rates. There is one contract period and orders are given commencement and completion dates. All work is subject to measurement and valuation, and this can be made the responsibility of the contractor or the contract administrator. Fluctuations provisions may apply or the contract may be fixed price.

When completing the form, entries in the contract particulars are required on matters including the list of properties; description of types of work; value of works; contract period; priority coding; payment provisions; and the break provision.

If acting as contract administrator, this responsibility will extend to all work carried out under the orders. This will include the issuing of orders and may include issue of instructions, variations, certificates for progress payments, extensions of time and cancellation of an order.

This is the only JCT standard form of contract published specifically for term contract working. The conditions are clearly worded and divided by section headings.

References and further reading

JCT Measured Term Contract 2016
JCT Measured Term Contract Guide 2016

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JCT PCC16

Joint Contracts Tribunal Ltd

Prime Cost Building Contract 2016 (PCC16)

Under the Prime Cost Building Contract (PCC16), the contractor is paid the prime cost of undertaking work (ie the actual cost) plus a management fee, which may be either a percentage of the prime cost or a fixed amount. The contract may be let without any drawings, specification or other information, and no work is carried out until an instruction is issued. This means that very little lead-in time is required and construction work can begin early. There is no reference to contractor design and all necessary information must be provided by the contract administrator.

Background

PCC16 is a cost-reimbursable contract. It allows for an early start on site without the need to completely define the extent and nature of the work. Originally intended for use in cases of repairs or alterations to damaged or old buildings where there are uncertainties as to the precise requirements of the work, the contract has, however, found wider use. It is often used during the early phases of a project with a lump sum or remeasurement contract used for later phases. The contract indicates that it is appropriate for projects designed by or on behalf of the employer, where it is not possible to prepare full design information before the works commence.

The contract, like others in the JCT suite, requires the appointment of a contract administrator and a quantity surveyor to administer the conditions. It also contains strict control of expenditure provisions. The contract makes no provision for any aspect of the work to be designed by the contractor; however, it does provide for sectional possession and completion.

The main changes in the 2011 edition related to payment and certificate provisions. Other changes included the extension of the role of the Principal Contractor to cover the Site Waste Management Plans Regulations 2008, the revision of the provision on terrorism cover and minor changes in the definition of insolvency and terminal payment rules.

The key 2016 changes can be summarised as follows:

- incorporation and updating of provisions from the JCT Public Sector Supplement
- changes relating to fair payment principles, transparency and building information modelling (BIM)
- amendments relating to the CDM Regulations 2015
- inclusion of references to various provisions of the Public Contracts Regulations 2015

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JCT PCC16

- changes in respect of payment, designed to reflect fair payment principles and to simplify and consolidate the payment provisions
- provision for monthly payments, including during the rectification period
- tightening up of the arrangements to secure provision of third party rights/warranties from subcontractors
- simplification and rationalisation of drafting in many areas; for example, calculation of amounts due and provisions for rectification following damage covered by insurance.

Structure

PCC16 is a heavyweight document, at 100 pages long. The articles of agreement include nine recitals and nine articles, and the agreement may be executed either under hand or as a deed if required.

The contract conditions are set out under eight section headings, helpfully indexed in a contents page at the front of the form. There are six schedules, as follows: schedule 1 provides the definition of prime cost; schedule 2 deals with revision and adjustment of the contract fee; schedule 3 is on insurance options; schedule 4, a code of practice relating to testing; schedule 5, third party rights; schedule 6, forms of bonds; and schedule 7, supplemental provisions.

Schedule 1: Definition of Prime Cost, includes general items, the contractor's workforce, site staff, materials and goods, plant and services, sundry costs, subcontract works, etc.

The supplemental provisions cover: collaborative working; health and safety (eg ensuring that this is treated as being of 'paramount concern' to all parties); cost saving and value improvement proposals by the contractor; sustainable development and environmental considerations; performance indicators and monitoring; notification and negotiation of disputes; transparency (the Freedom of Information Act 2000); and compliance with the Public Contracts Regulations 2015.

The contract particulars and schedules should be fully and carefully completed because the nature of the intended work is likely to mean that the contract will be let on minimal information. There may or may not be drawings to accompany the specification and the contents of the schedules are therefore vital for both tendering and valuation purposes.

Use

In the recitals, after stating in general terms the nature of the works, reference is made to a specification and any drawings (which, if used, should describe as clearly as possible the nature of the works to be carried out). The contract administrator responsible for the preparation of these is the person named in article 3. The quantity surveyor is the person named in article 4.

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The contractor undertakes to carry out and complete the works referred to in the second recital, together with other items as instructed by the contract administrator (although presumably the scope of the contract may not be materially altered).

The employer undertakes to pay the contractor the prime cost (hence the importance of the definitions in schedule 1) and the contract fee (schedule 2). There is provision for the fee to be revised if alterations in the nature or scope of the works justify this.

Synopsis

1 Roles

- The Parties to the Contract are termed the Employer and the Contractor.
- The Contractor's main duty is to construct the Works as described in the Contract Documents (Article 1 and 2.1). There is no provision for the Contractor to design any parts of the Works.
- A collaborative working clause (Supplemental Provision 1) may be incorporated that requires both Parties to work with each other and the project team in a cooperative and collaborative manner, in good faith, and in a spirit of mutual trust and respect.
- The Contractor must comply with all statutory obligations and give all required notices (2.1.1).
- Each Party undertakes to the other to comply with the CDM Regulations (3.23). In particular, the Employer must ensure that the Principal Designer carries out its duties and, where the Contractor is not the Principal Contractor, the Employer must ensure that the Principal Contractor carries out its duties (3.23.1).
- The Contractor must comply with Regulations 8 and 15 and, when it is the Principal Contractor, with Regulations 12 to 14 (3.23.2).
- The Contract makes provision for an Architect/Contract Administrator, who is identified in Article 3. The Architect/Contract Administrator's role includes issuing instructions, Payment Certificates, extensions of time and a Practical Completion Certificate. The Employer must appoint an Architect/Contract Administrator to fulfil this role, and appoint a replacement within 21 days should the Architect/Contract Administrator cease to hold this post (3.5).
- The Contract also makes provision for a Quantity Surveyor, who is identified in Article 4 and whose role includes assessing the value of variations, of Payment Certificates and of loss and/or expense claims. As with the Contract Administrator, the Employer must appoint a replacement should the Quantity Surveyor cease to act (3.5).
- The Employer may appoint an individual to act as its representative by notifying the Contractor, and that representative will exercise all the functions of the Employer except as indicated in the notice (3.3).

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- The Employer may appoint a clerk of works, whose duty is solely to inspect under the direction of the Contract Administrator (3.4).
- Sub-contracting any part of the work, including any design, requires the Architect/Contract Administrator's written consent (3.7.1).
- The Employer may require the Contractor to sub-let parts of the Works to persons named in a list included in or annexed to the Specification. There must be no fewer than three firms 'able and willing' to carry out the specified sub-contract work at the required time (3.8). The Contractor is fully responsible for these firms.
- The Contractor is responsible for the performance of all sub-contractors, including listed sub-contractors (3.7.1).
- There is a bar to assignment without written consent which refers to the 'Contract or any rights thereunder' (6.1).

2 Documents

- The Contract Documents are defined as 'the Specification, the Contract Drawings (if any), the Agreement, these Conditions and (where applicable) the BIM Protocol'. In many cases, no drawings or documents describing the scope or quantity of work would be issued at tender stage, nor would they form part of the Contract. Such documents would normally be issued by the Architect/Contract Administrator with each order.
- The Agreement and the Conditions are to be read as a whole and nothing in any other Contract Document, or in any Framework Agreement, can override or modify the Agreement or Conditions (1.3).
- A list of definitions is included (1.1). Rules for interpretation are set out, including a gender bias clause, and that a 'person' refers to an individual, firm, partnership, company and any other body corporate (1.4).
- In the case of discrepancies or divergences in or between documents, corrective instructions must be given (2.10).
- The Contractor is to notify the Architect/Contract Administrator if it finds any conflict between Statutory Requirements and the documents. The Architect/Contract Administrator must issue an instruction and the Contractor is thereafter not liable to the Employer under the Contract for any non-compliance with Statutory Requirements resulting from the instruction (2.11).
- Rights of third parties under the Contracts (Rights of Third Parties) Act 1999 are specifically excluded (1.6).
- The Contract provides for third party rights to be assigned to purchasers/tenants and funders (6A and 6B). The requirement to grant third party rights to identified persons, together with information regarding limits to the Contractor's liability,

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must be set out in a separate document (the Rights Particulars) referred to in the Contract Particulars. The rights are set out in Schedule 5.

- The Contract provides options for collateral warranties to be provided by the Contractor to purchasers/tenants and funders (6C and 6D), and by sub-contractors to purchasers/tenants, funders and/or to the Employer (6E). The requirement to enter into warranties must be set out in the Rights Particulars and the relevant persons and sub-contractors identified, together with information regarding the limits to the Contractor's liability.
- The warranties provided by the Contractor to purchaser/tenant and funder are to be on the JCT standard forms CWa/P&T and CWa/F (6C and 6D). The JCT also publishes SCWa/F, SCWa/P&T and SCWa/E for use in relation to sub-contractors, but their use must be required by the parties under the Rights Particulars (6E).

3 Control: time

- Dates for possession and completion are to be entered in the Contract Particulars. There is provision for deferment of possession for up to six weeks (2.4).
- The Contractor is to proceed regularly and diligently and complete on or before the Completion Date (2.3).
- Notice of delay must be given by the Contractor in writing (2.19.1). The Architect/Contract Administrator is empowered to award an extension of time should completion be delayed beyond the Completion Date, provided that the reason is one or more of the Relevant Events listed. The Architect/Contract Administrator is to make, in writing, a fair and reasonable extension, or notify the Contractor that no extension is due, within 12 weeks of receipt of the notice and particulars (2.20.1 and 2.20.2).
- Failure by the Contractor to complete within the contract period is to be certified by the Architect/Contract Administrator (2.23). Liquidated damages are then recoverable by the Employer (2.24).
- Practical completion is to be certified by the Architect/Contract Administrator (2.22).
- There is provision for partial possession by the Employer (2.25).
- The Contractor is obliged to rectify defects (2.30) which are notified by the Architect/Contract Administrator within 14 days of the expiry of the Rectification Period.

4 Control: quality

- The Contractor is obliged to carry out and complete the Works in all respects in accordance with the Contract Documents and empowered instructions of the Architect/Contract Administrator (2.1).
- Quality and standards, so far as procurable, are to be as described in the Specification (2.2).

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- The Contractor must be provided with such further drawings or details as are reasonably necessary to explain and amplify the Specification (2.9.1). There are limits to the use of the Specification and all drawings, and the confidentiality of rates must be respected.
- Access for the Architect/Contract Administrator is allowed at all reasonable times (3.1).
- Action necessary as a consequence of the discovery of antiquities (3.22) is included.
- There is provision for opening up, inspection and testing (3.17 and 3.18) and the familiar JCT Code of Practice relating to the fair and reasonable operation of this provision is included in the form at Schedule 4.

5 Control: cost

- There is no Contract Sum, but Article 2 refers to a Prime Cost, Contract Fee and any direct loss and/or expense ascertained.
- The Contractor is required to carry out the work 'as economically as possible' (2.1.2), and not to employ upon the site more people than are reasonably required (2.1.3); this provides some protection for the Employer.
- The Prime Cost is defined in detail in Schedule 1 and includes the cost of the Contractor's staff on site, the Contractor's direct work force, materials and goods provided by the Contractor, plant, services and consumables, sundry costs and sub-contract work (Schedule 1: 1.1). It is possible to agree in advance lump sum items to replace parts of the prime costs, in which case these are entered in the Contract Particulars.
- The Contract Fee is to be stated in the Contract Particulars, and may be a fixed amount or a percentage fee. It may be adjusted in accordance with the provisions in Schedule 2 (4.3.1).
- The Contractor is empowered to carry out limited work for emergency compliance with Statutory Requirements, and this will be treated as an instruction and valued accordingly (2.12).
- The Contractor may make written application for reimbursement of direct loss and expense suffered under specified headings or 'matters' (4.16.1). Common law rights are preserved (4.20).
- Interim valuations are to be made by the Quantity Surveyor and the Contractor must provide the Quantity Surveyor with necessary details of expenditure to enable valuations to be made (4.7.2 and 4.7.3).
- The amounts payable under the Contract are exclusive of VAT and the Employer, in addition to any payment, is expected to pay VAT as properly charged (4.4).

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- The monthly due dates for interim payment from commencement to practical completion shall be seven days after the Interim Valuation Dates specified in the Contract Particulars (4.6).
- The Architect/Contract Administrator is to issue an interim payment certificate within five days of each due date, stating the sum that it considers to be due to the Contractor on the relevant due date and the basis on which it was calculated (4.7).
- The Contractor is entitled, not later than the Interim Valuation Date, to issue to the Quantity Surveyor an application for payment, stating the sum it considers should be due to it on the relevant due date and basis for the calculation. Where such application is made and the Architect/Contract Administrator fails to issue an interim certificate, the application becomes a Payment Notice. Where no application has been made and the Architect/Contract Administrator has not issued a Payment Certificate, the Contractor may then issue a Payment Notice (4.8). In the latter circumstance, the final date for payment is extended by the same number of days after the expiry of the period that it took for the Contractor to issue a Payment Notice (4.9.4).
- The final date for payment is 14 days from the due date (4.9.1) and, except where a Pay Less Notice has been issued, the Employer shall pay the amount stated in the Payment Certificate or Payment Notice (4.9.2).
- Where the Employer intends to pay less than the amount stated in either the Payment Certificate or the Payment Notice, it is required to issue a notice not later than five days before the final payment date stating the amount that it considers to be due to the Contractor on the date of the notice and the basis for its calculation (4.9.5 and 4.10.1).
- Overdue sums that remain unpaid after the final date for payment shall attract simple interest (4.9.6) and also the Contractor may, after a seven-day notice, suspend some or all its obligations under the Contract. The Employer shall be liable for all reasonable costs of such suspension (4.11).
- There are specific timescales for the receipt of documentation from the Contractor and the issuance of the final payment certificate (4.21 and 4.22). The process of issuance and payment for the Final Certificate is subject to the same rules on payment notices and certification as those discussed above for interim payments.

6 Insurance

- The Contractor indemnifies the Employer in respect of personal injury or death, unless due to the Employer's negligence (5.1).
- The Contractor indemnifies the Employer in respect of damage to property, provided that this is due to the Contractor's negligence (5.2).

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- The Contractor is to maintain insurance to cover these indemnities, and the minimum cover required by the Contract is the sum entered in the Contract Particulars (5.4.1). This does not necessarily limit the Contractor's liability.
- If instructed, the Contractor is to take out joint names insurance for the Employer against the risk of legal nuisance. There is a list of exceptions and damage must not be attributable to any negligence by the Contractor (5.5).
- Insurance of the Works is for 'all risks' where new buildings are concerned, and a joint names policy may be taken out by the Contractor or the Employer as selected (Schedule 3, Option A or B).
- Insurance of existing structures and contents is for specified perils and is to be taken out in joint names by the Employer (Schedule 3, Option C).
- In the event of terrorism cover ceasing to be available, the options open to the Employer are stated in clause 5.11.
- Where insurance is required against the Employer's losses due to non-negligent damage to property, then clause 5.5.1 should be stated to apply in the Contract Particulars.
- An entry in the Contract Particulars will show whether the Joint Fire Code is to apply. If so, both the Contractor and the Employer will need to respect it since, in the event of non-compliance, the insurers can specify remedial measures which must be undertaken (5.16 and 5.17).

7 Termination

- The Employer is allowed to terminate the employment of the Contractor by reasons of specified defaults (7.4). A warning notice may be issued by the Architect/Contract Administrator (7.4.1), but the notice of determination is a matter for the Employer (7.4.2). In the case of insolvency of the Contractor, then the Employer may at any time terminate the Contractor's employment by means of a notice (7.5.1).
- The Employer may also terminate the Contractor's employment for a breach of the Bribery Act 2010, or where certain breaches of the Public Contracts Regulations 2015 arise (7.6).
- The Contractor is allowed to terminate its own employment for specified defaults by the Employer (7.9). The procedures must be followed meticulously. In the event of insolvency of the Employer, the Contractor may elect to terminate its own employment (7.10).
- Either Party can terminate the employment of the Contractor for listed neutral causes (7.11).
- The respective rights and duties of the Parties concerning payment, removal and completion are set out in detail in the applicable clauses.

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JCT PCC16

8 Dispute avoidance and resolution

- Part II of the Housing Grants, Construction and Regeneration Act 1996 gives either Party a statutory right to refer any difference or dispute arising out of the Contract to adjudication. Article 7 and clause 8.2 provide for this. The Scheme for Construction Contracts (England and Wales) Regulations 1998 will apply.
- If Arbitration is to be the method for final resolution of disputes, then the Contract Particulars must state that Article 8 and clauses 8.3 to 8.8, which detail the procedure for arbitration, apply.
- Arbitration is to be conducted in accordance with the JCT 2016 edition of the Construction Industry Model Arbitration Rules.
- Where arbitration has not been selected as the chosen method, then Article 9 will apply and the dispute will be determined by legal proceedings.

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JCT PCC16

This contract?

If considering using PCC16, the following points should be borne in mind.

It is intended for contracts where work must be started on site ahead of full documentation or where the nature of the intended work is such that it is impossible to prepare full information.

The recitals refer to a specification and such drawings as have been prepared prior to tender, and an estimate of the prime cost of the items of work as set out in the contract particulars. The contract fee charged by the contractor may be either on a fixed or a percentage basis as indicated in the contract particulars, and is adjusted in accordance with Schedule 2.

There is no provision for design by the contractor or for performance specified work. The employer is required to appoint a contract administrator, who must issue all information required for the construction of the works, and a quantity surveyor.

PCC16 provides for partial possession and sectional completion. Subcontractors may be selected by the contractor from a list of not fewer than three names.

When completing the form, entries are required relating to decisions on matters including deferment of possession, bonds (listed items), insurance of the works, Joint Fire Code and liquidated damages.

This is a procurement method which brings considerable risks for the employer. However, it seems to have been used without serious problems, possibly due to careful selection of the contractor, a realistic attitude on the part of the employer and sound practice in contract administration.

It is published in one version for either private or public sector clients.

The form is for use in England and Wales. The Scottish Building Contract Committee publishes its own Prime Cost Building Contract for use in Scotland.

References and further reading

JCT Prime Cost Building Contract 2016
JCT Prime Cost Building Contract Guide 2016

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JCT RM16

The Joint Contract Tribunal Ltd

Repair and Maintenance Contract (Commercial) 2016 (RM16)

This a straightforward, short contract intended for small amounts of work that are fully described in the contract documents. There is no provision for a contract administrator or for any contractor design.

Background

The Repair and Maintenance Contract (Commercial) 2016 (RM16) is intended for use on 'individual, substantially defined, programmes of repair and/or maintenance on specified buildings or sites'. It is derived from the JCT Conditions of Contract for Building Works of a Jobbing Character (JA/C 90), which was originally introduced in 1990.

RM16 is for employers who have a building stock which requires small jobs to be undertaken from time to time, in the nature of repairs and maintenance, and who are reasonably experienced in commissioning such work. It is not intended for use by homeowners and it does not provide for the role of a contract administrator.

Structure

The form is relatively short, running to 24 pages in total. It contains a form of invitation to tender and a form of tender. It also includes contract particulars and guidance notes, together with ten pages of conditions arranged under seven section headings. The supplemental provisions cover: collaborative working; health and safety (eg ensuring that this is treated as being of 'paramount concern' to everybody involved in the Project); cost saving and value improvement proposals by the contractor; sustainable development and environmental considerations; performance indicators and monitoring; notification and negotiation of disputes; transparency (the Freedom of Information Act 2000); and compliance with the Public Contracts Regulations 2015.

Use

RM16 is intended for defined small projects but is not to be used as a term contract (ie for periodic or regular maintenance), for which the Measured Term Contract would be more appropriate. It allows for three different bases for pricing, either as a lump sum contract, as a re-measurement contract or as a mixture of the two with defined work being priced as a lump sum and additional work measured using an agreed schedule of rates.

The form is intended for use by local authority or commercial clients, who will be experienced in placing orders for such work and in dealing with contractors' accounts.

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All the details regarding the work to be carried out and the information required under the contract particulars must be sent to the contractor at the time of tender. In particular, the contractor must be told on which basis it is to price the work, as a lump sum and/or a schedule of rates, and the start and completion dates for the works.

The contract will come into existence after the contractor has completed and returned the tender form and the employer has accepted that tender. The completed tender, signed by the employer and returned to the contractor, is the evidence that agreement has been reached, and there is therefore no need for recitals, articles or an attestation. As an alternative, as explained in the guidance notes, the RM16 conditions may be incorporated by reference in an employer's order, in which case the relevant parts of the form should be marked 'not used'.

The 2016 edition of the contract is generally compliant with the Housing Grants, Construction and Regeneration Act 1996 (HGCRA). It should be noted that the form allows for payment at a single stage for projects with durations of less than 45 days which also fall outside the scope of the Act and also makes provision for stage payments for projects lasting for 45 days or more (item 3 of the contract particulars).

Synopsis

1 Roles

- The Parties to the Contract are the Employer and the Contractor.
- The Contract has no provision for a contract administrator. The Employer is entitled to appoint a representative, who must be identified in the Contract Particulars (3.2).
- There is no reference to access for the Employer's representative, but this is probably implied.
- The Contractor's key obligation is to carry out the Works 'in a regular, diligent and competent manner, in accordance with the Contract, the Construction Phase Plan and Statutory Requirements' (2.1).
- Each Party undertakes to comply with all its duties under the CDM Regulations (3.7).
- The Employer has a range of obligations, including to allow access to the site and to pay the Contractor.
- A collaborative working clause (Supplemental Provision 1) may be incorporated that requires both Parties to work with each other and the project team in a cooperative and collaborative manner, in good faith and in a spirit of mutual trust and respect.

2 Documents

- As there are no Articles, the Works to be carried out are identified in the Invitation to Tender and the Contract Particulars.

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JCT RM16

- The Employer is obliged to issue any further information the Contractor may reasonably require to carry out the Works (2.3).
- There is a list of definitions set out in clause 1.1
- The Conditions and the accepted Tender prevail over any other document. No priority is given between the Conditions and the Tender (1.2.1).
- As there is no reference to discrepancies, these would have to be resolved by discussion and agreement.
- Rights of third parties under the Contracts (Rights of Third Parties) Act 1999 are specifically excluded, except as provided for in the Contract (1.2.3).

3 Control: time

- The Works may be commenced on, and shall be completed by, dates that are entered in the Contract Particulars (2.2).
- The Employer must fix a new completion date if the Contractor is delayed for a reason beyond its control (2.4).
- The Contractor must use reasonable endeavours to prevent delay (2.4).
- There is no provision for liquidated damages.
- There is no requirement for a statement of practical completion and the Rectification Period runs for six weeks after the completion of the Works.

4 Control: quality

- The Contractor shall not assign the benefit of the Contract and also shall not sub-contract the Works or any part of them without the prior written consent of the Employer. Such consent is not to be unreasonably withheld (3.1.4, 3.1.5).
- There is no provision for naming or listing approved firms, although a list could be included in the Specification.
- The Employer may appoint a representative (3.2).
- The Employer may issue instructions, which shall be in writing and where issued orally shall be confirmed in writing (3.3). Instructions requiring Variations may be issued by the Employer, although the scope of these is limited to those of 'a nature and scale that is reasonable relative to the scope of the Works' (3.4).

5 Control: cost

- The Contract Price is exclusive of VAT.
- The Contract may be let on a lump sum basis, as a measurement contract or as a combination of these.

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JCT RM16

- Payment may be by instalments or by a single payment. If instalments are used, the Contractor is to invoice at the agreed stages and the Employer must pay within 14 days of the invoice (4.3, 4.5).
- On completion of the Works, the Contractor sends the Employer an itemised invoice (4.4, 4.5), which must be paid within 14 days.
- If the Employer intends to pay less than the sum stated in the invoice, the Employer is required to, not later than five days from the final date for payment, issue a notice stating the sum it considers due to the Contractor on the date of the notice and the basis on which it was calculated (4.6). It must be noted that the Employer is not entitled to withhold or deduct any amount from monies due to the Contractor unless the proper notice has been issued.
- Failure to pay by the final date for payment will attract simple interest on the overdue amount (4.7) and can give the Contractor a right to suspend some or all of its obligations, with a right to recover reasonable costs and expenses incurred as a result of such suspension. Suspension is to be preceded by the service of a seven-day notice and may only progress where there is a failure to remedy the non-payment after the seven-day period (4.8).
- There is no provision for retention, therefore nothing is withheld over the Rectification Period.
- There is no provision for fluctuations.

6 Insurance

- The Contractor is to indemnify the Employer in respect of personal injury or death, or damage to property other than the Works caused by its own negligence (5.1 and 5.2). This is to be backed by insurance, and an entry in the Contract Particulars will state the minimum cover (5.3).
- Unless the Contract Particulars state otherwise, joint names insurance of existing structures, and the Works, is to be arranged by the Employer. The contractual requirement is, in the case of the existing structure, for cover against Specified Perils and, in the case of the Works, for 'all risks' insurance (5.4A).
- If required under the Contract Particulars, the Contractor is obliged to arrange insurance of the works in a joint names, all risks policy (5.4B). The percentage to cover professional fees should be inserted.

7 Termination

- Each Party is entitled to terminate the Contract immediately if the other Party becomes insolvent, or after a seven-day warning notice has been issued if the other Party is in material breach (6.1).
- The Employer may terminate the Contractor's employment in the event of any corruption (6.2).

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8 Dispute avoidance and resolution

- Disputes may be resolved through mediation or through adjudication under the Scheme for Construction Contracts (England and Wales) Regulations 1998.
- There is no arbitration clause, therefore either Party would have the right to pursue a claim through litigation.

This contract?

If considering using RM16, the following points should be borne in mind.

RM16 is an attractive option for employers who wish to undertake small works and do not require a contract administrator.

The form is flexible, allowing for use with its incorporated forms of invitation and tender or by means of a works order. It also allows for a variety of methods of pricing, reflecting the reality of commissioning work of this nature.

The form does not contain any provisions for liquidated damages or for retention and there is nothing to cover the situation where the contractor may be undertaking any design. It will therefore be most suited to experienced employers on very short, one-off jobs. For longer commercial projects, MW16 or MWD16 should be considered, and where a series of jobs is anticipated, the JCT Measured Term Contract (MTC16) may be more appropriate. If the employer is the residential occupier of the property on which the work is to be carried out, the home owner/occupier contracts may be used.

References and further reading

JCT Repair and Maintenance Contract (Commercial) 2016

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JCT HO/B05 and HO/C05 & HO/CA05

Joint Contracts Tribunal Ltd

Building Contract for a Home Owner/ Occupier who has not appointed a consultant to oversee the work (HO/B05, 2015 revision)

Building Contract and Consultancy Agreement for a Home Owner/ Occupier who has appointed a consultant to oversee the work (HO/C05, 2015 revision & HO/CA05, 2015 revision)

These contracts are for homeowners or occupiers wishing to carry out work to their own home. There are two versions, one of which has a role for a contract administrator to issue instructions and certificates. Neither contract allows for any contractor design input.

Background

The JCT has two forms of building contract for homeowners or occupiers intending to carry out domestic building work. They are both packaged in a folder, together with duplicate copies of the forms for the customer and the builder and guidance notes. They are written in a refreshingly accessible style, commendably free from jargon and legal language, which has gained them the Crystal Mark for clarity, awarded by the Plain English Campaign. They are marketed widely directly to customers through retail outlets, such as bookshops.

The first form published in 1999 was the Building Contract for a Home Owner/ Occupier, suitable for use where the customer chose to deal directly with a builder for home improvements, small extensions or repairs. Obviously, this promised a significant improvement over oral arrangements or poorly worded letters and encouraged the parties to methodically consider and agree the important points before concluding the deal.

The second form, published in 2001, was the Building Contract and Consultancy Agreement for a Home Owner/Occupier who has appointed a consultant, and it followed the same attractive format for packaging and presentation. This is a more appropriate form for smaller scale domestic work involving architects and building

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JCT HO/B05 and HO/C05 & HO/CA05

surveyors than the JCT Minor Works Contract, which is perhaps more suited to work of a commercial nature.

It can be used only where a consultant is appointed to act on the customer's behalf, and the document folder includes a JCT Consultancy Agreement for professional services, which is dedicated for use with this building contract. It is likely to prove more appropriate in these circumstances than agreements published by the professional bodies. Both forms were republished in 2005 and revised in 2009 and 2015.

Structure

HO/B05 is just 13 pages long and is in two parts. The first part comprises a form to be completed in duplicate which sets out the arrangements for the work. The second part contains the contract conditions, clearly and simply worded under 12 headings (also two copies). The customer is provided with an enquiry letter to send to a potential builder, a sheet of helpful guidance notes and a cancellation form in the event that he or she wishes to cancel the contract within seven days of entering into it.

HO/C05 & HO/CA05 includes a building contract, which has two parts; part 1 is the arrangements for the work and part 2 is the conditions, set out under 14 headings. The consultancy agreement is also a two-part document; part 1 comprises the consultant's services and part 2 the conditions, set out under 14 headings, a total of just 13 pages of text. There are copies of each for the customer and the contractor, together with guidance notes and cancellation forms.

Use

Both forms are simple and easy to understand. They are only suitable for construction contracts to which Part II of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) does not apply.

HO/B05 must not be used where a consultant is employed. There is no stated cost limit but, as will be obvious from the excellent tick box approach used for the arrangements document and the basic contract conditions, it is for very small domestic work only. Incidentally, for architects who are involved in a partial service for domestic work but whose clients nevertheless ask for advice about appointing a builder, this form would be a sound recommendation.

HO/C05 & HO/CA05 is for a home owner/occupier who intends to appoint a consultant to deal directly with the builder. Note that it is suitable only for a home owner. If the work is being carried out as a business venture, then one of the commercial contracts should be used.

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JCT HO/B05 and HO/C05 & HO/CA05

Synopsis – HO/B05 (2015 revision)

1 Roles

- The parties to the contract are the customer and the contractor. No other persons are identified or referred to in the contract.
- The contractor's responsibilities are listed in clause 1, and include carrying out the work and completing it within the stated working period. The customer's responsibilities are set out in clause 2, and include giving the contractor access to the premises.
- Either the customer or the contractor may deal with applications for planning permission, building regulations and party wall consents (B1). The contract price is deemed to include the costs of such applications if the contractor is applying for them.
- Facilities for the contractor, as ticked in the arrangements section, are to be provided free of charge by the customer.
- Contractor's responsibilities include storing equipment at the end of each day, regularly disposing of rubbish and leaving all working areas clean and tidy after finishing the work (1(f) and (g)).

2 Documents

- The contract documents comprise drawings and/or the specification or other documents. The contract does not refer to bills of quantities.
- The contract states that only the customer and the contractor can bring an action to enforce its terms, which would exclude rights of third parties under the Contracts (Rights of Third Parties) Act 1999 (11(c)).

3 Control: time

- A start and completion date should be entered, or a contract period stated (Part 1F). Working hours may be specified.
- The customer can extend the working period if the contractor is delayed for a limited number of stated reasons (5(a)).

4 Control: quality

- Only the customer can change work details (4). The contractor is to submit a price before work goes ahead.

5 Control: cost

- This is a lump sum contract. Note that the contractor's quotation is VAT inclusive (D1).

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JCT HO/B05 and HO/C05 & HO/CA05

- Payment may be by a single payment or by agreed instalments (6(a)). The customer is to pay on receipt of the contractor's invoice, within 14 days, 95 per cent of the total amount due (6(b)).
- The remaining 5 per cent of the money is due within 14 days of the contractor putting right any faults promptly reported by the customer (6(c)).

6 Insurance

- Insurance provisions are limited to the customer's household insurance and the contractor's 'all risks' cover for damage to work and unfixed materials and public liability cover.
- The customer is to indicate whether the premises will be occupied (lived in) during the duration of the works. If the premises are unoccupied during the time of construction, the contractor is to take practical and common-sense precautions to deter intruders.

7 Termination

- The customer has a right to cancel the contract for any reason by giving the contractor a notice in writing within seven days of signing the contract (9). The main position is that all payments made (or monies disbursed) by the customer are returned to it. However, where the customer had agreed in writing that the contractor should provide certain types of goods and services within the seven-day period, the customer may be required to pay for those goods and services (examples include perishable goods).
- Either the customer or the contractor can bring the contract to an end for certain stated reasons (8).

8 Dispute avoidance and resolution

- If disputes arise, either party can start court proceedings or may opt for adjudication (K).

Synopsis – HO/C05 (2015 revision)

1 Roles

- The parties to the contract are the customer and the contractor, and their details are inserted on page 2 of the contract. The consultant is also identified on page 2.
- The contractor's responsibilities are listed in Part 2.1 and include carrying out the work set out in the work details and as the consultant instructs.
- Part 1B.1 makes it clear that the consultant will deal with applications for planning permission, building regulations approval and party wall consents. The contractor will not start work until the necessary consents have been received (Part 1B.2).

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JCT HO/B05 and HO/C05 & HO/CA05

- The contractor is to take all practical steps to prevent or minimise health and safety risks to the customer and other occupants and to minimise environmental disturbance, nuisance or pollution (Part 2.4). In return, the customer undertakes to take notice of warnings given by the contractor and not knowingly allow occupants or visitors to be exposed to dangers.
- Facilities for the contractor, as ticked, are to be provided free of charge by the customer (Part 1C).
- The contractor's responsibilities include storing equipment at the end of each day, regularly disposing of rubbish and leaving all working areas clean and tidy after finishing the work (Part 2.1).
- The consultant will act for the customer in giving instructions, granting extensions of time and issuing certificates (Part 2.3).

2 Documents

- The description of the work is detailed in the contractor's quotation and/or consultant's drawings and/or consultant's specification and/or 'other documents', as identified in Part 1A.2.
- The contract states that only the customer and the contractor can bring an action to enforce its terms, which would exclude rights of third parties under the Contracts (Rights of Third Parties) Act 1999 (9(c)).

3 Control: time

- A start and completion date should be entered, or a contract period stated (Part 1F). Working hours may be specified.
- The consultant can make a fair and reasonable extension if the contractor is unable to complete on time due to reasons beyond its control. If the delay is caused by the consultant or the customer, the contractor may also be entitled to costs (Part 2.6).

4 Control: quality

- The contractor's responsibilities include carrying out work carefully, competently and 'as the consultant instructs', being 'at the premises regularly to carry out the work' and keeping 'to all his legal duties and responsibilities' (Part 2.1).
- The customer's responsibilities include providing access to the premises throughout the working period, keeping working areas clear of obstructions and allowing the contractor to carry out work in an order which it considers necessary to complete on time (Part 2.2).
- The customer can expect to receive the benefit of any product guarantees (Part 1G).
- Changing the work details can be ordered only by the consultant. Where an increase in work is likely, the contractor must quote the extra cost and time involved before

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work can be authorised. Where change amounts to a reduction of work, the contractor will make an appropriate deduction (Part 2.5).

- Welfare facilities to be provided for the contractor free of charge by the customer are as ticked (Part 1C).
- There are only two types of certificate: the first is issued on completion of the work or stage of the work and the second after the contractor has rectified all faults at the end of the defects liability period of three months (Part 2.3).

5 Control: cost

- This is a lump sum contract. The contractor's price is VAT inclusive. The contractor is to itemise this and show details of VAT chargeable (Part 1D).
- The price includes for 'unexpected problems', which should have been foreseen by the contractor from the documents or a site visit. The contract figure can only be changed up or down if changes to the work are instructed.
- Although there are no monetary certificates, the consultant must be satisfied that the contractor's invoices are correct. The contract states that, in the event of any disagreement with the consultant's decisions, the contractor must take this up directly with the customer (Part 2.3).
- Payment may be a single payment or by instalments, as agreed. On completion of the work, the customer is to pay 95 per cent of the total amount due. If stage payments are selected, they should be clearly defined and amounts stated.
- The customer is expected to pay 95 per cent of the total price for the work within 14 days after completion has been certified by the consultant. There is a three-month defects liability period, at the end of which the consultant will issue a list of any faults. When these have been rectified, the remaining 5 per cent will be due within 14 days after rectification has been certified (Part 2.8).

6 Insurance

- Insurance provisions are minimal and limited to the householder's insurance, the contractor's 'all risks' cover for the full cost of damage to the work and unfixed materials (no perils stipulated) and public liability cover. The contract liability cover figure is to be entered (Part 1H).
- Provisions for occupation and security of premises are limited. If remaining in residence, the customer should be made aware of the inconvenience and disruption which might result, and the contractor should allow for temporary protective measures as appropriate. If the customer is vacating the premises, house insurance policies should be checked, as most suspend cover where premises are left unoccupied beyond a stated period, and special arrangements might be advisable. Also, the contractor's obligation to adopt 'practical and common-sense precautions' might require something more specific in the Specification.

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JCT HO/B05 and HO/C05 & HO/CA05

7 Termination

- The customer has a right to cancel the contract for any reason by giving the contractor a notice in writing within seven days of signing the contract. The main position is that all payments made (or monies disbursed) by the customer are returned to it. However, where the customer had agreed in writing that the contractor should provide certain types of goods and services within the seven-day period, the customer may be required to pay for those goods and services (examples include perishable goods) (Part 2.11).
- Either the customer or the contractor can bring the contract to an end for certain stated reasons (Part 2.10).

8 Dispute avoidance and resolution

- If disputes arise, either party can start court proceedings or may opt for adjudication. In the latter event, the contractor may not apply to the National Specialist Contractors Council to be the appointor (Part 1K).
- Other rights and remedies are not extinguished by the contract provisions (Part 2.13).

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JCT HO/B05 and HO/C05 & HO/CA05

This contract?

If considering using the JCT Home Owner/Occupier Contracts, the following points should be borne in mind.

Each form is intended for use only with work for homeowners/occupiers. If the customer wishes to appoint a consultant, then the only form to be used is the version which gives a role for the consultant. In such cases, the dedicated Consultancy Agreement must also be used.

This document takes a very practical and clear approach to defining the services and the conditions which will apply.

Completing the forms should be straightforward, but care is needed to make sure that duplicate copies carry identical entries.

Problems could arise relating to possession and occupation, work sequence, design responsibility (particularly relating to services installations or other specialist work) and insurance.

Helpful guidance notes are provided for each contract and they should be read carefully, particularly in the case of the version where a consultant is appointed. As yet, there are no dedicated contract administration forms available, but letters should be clearly identified as certificates where they are intended to serve as such.

Each of these forms adopts a completely fresh and friendly approach, which will initially be unfamiliar to most contract administrators. The presentation and packaging is novel and customer orientated. The terminology is straightforward and the forms are commendably written in plain English.

Neither of the forms is suitable for use in Scotland; the Scottish Building Contract Committee publishes Homeowner Contracts for use in Scotland.

References and further reading

JCT Building Contract for a Home Owner/Occupier who has not appointed a consultant to oversee the work 2005 (2015 revision)
JCT Building Contract and Consultancy Agreement for a Home Owner/Occupier who has appointed a consultant to oversee the work 2005 (2015 revision)

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JCT FA16

Joint Contracts Tribunal Ltd

Framework Agreement 2016 (FA16)

The JCT Framework Agreement is a bilateral contract intended for use by an employer wishing to establish a collaborative relationship with a single service provider, whom it anticipates using to undertake work on one or more projects. The agreement sets out the tasks that the provider may be asked to undertake and the mechanisms by which they may be required to be carried out. It also establishes framework objectives and includes provisions aimed at encouraging the parties to work together to achieve those objectives.

Background

In 2001, the JCT published a Non-binding Partnering Charter, its first publication to address the increased interest in partnering principles, given impetus by the Latham Report. This was a model charter, extremely simple and only three pages long, intended for use on a single project to supplement any of the main JCT standard forms. The model partnering charter has been republished in a 2016 edition, downloadable free from the JCT website.

In 2005, the JCT published two new Framework Agreements, in addition to the model charter, one binding and one non-binding, together with a guide on their use. These were longer and more sophisticated documents than the model charter. They took the same approach as the model charter in that they were intended for use alongside another contract.

The two 2005 framework agreements were replaced in 2016 by a single, longer and more complex document. This is directed at the current, widely prevalent use of framework arrangements by local authorities working under EU procurement rules, but could also be used by any organisation intending to set up a collaborative agreement over a period of time, allowing for a series of individual projects or packages of work to be procured over a given period.

Structure

The framework agreement is a binding contract by which the employer and the provider agree to work together in a collaborative and open manner to achieve agreed objectives. It includes provisions regarding framework objectives, organisational structure and decision making, collaborative working, the supply chain, sharing of information, communication, confidentiality, risk assessment and allocation, health and safety, sustainable development, value engineering, change control procedures, early warning, a team approach to problem solving and performance indicators.

In addition to establishing overriding objectives, the framework agreement also sets up a mechanism whereby specific services or works may be 'called off', including the

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JCT FA16

procedures for doing so, the basis for pricing and the terms under which these contracts will be let.

Use

The framework agreement is intended to be entered into for a term set out in the framework particulars at the back of the form. These are bilateral agreements between the employer and the provider (between, for example, client and contractor or contractor and subcontractor). The provider must endeavour to see that the members of its supply chain adhere to the principles of collaborative working.

The parties set out tasks that the employer may require in the framework particulars (these could be services or construction work and it is likely they would need to be detailed in a separate document). The employer does not undertake that it will award any tasks to the provider, unless specifically indicated in the framework particulars (4.1).

As well as listing the tasks, the parties must set out the means of pricing these tasks in pricing documents, which are listed in annex 3 (4.5). The third key item to be set out are the underlying contracts, which will be the basis on which the tasks are let. These could be any other JCT contracts or standard forms produced by other publishing bodies. FA16 is intended to supplement and complement the terms of the underlying contracts but not to replace them and, in the case of conflict, the underlying contract prevails (6).

When the employer requires specific tasks to be performed, it issues an enquiry to the provider on the form included under Annex 1, identifying the tasks and attaching the completed articles, recitals and contract particulars for the relevant underlying contract (4.3). The provider then submits a price for the tasks, based on the prices in the pricing documents, and any other information requested by the employer (4.4 and 4.5). If the employer accepts the submission, it executes and issues an 'Order', which sets out the tasks and refers to the enquiry and the underlying contract.

Synopsis

1 Roles

- There are two Parties to the Framework Agreement, the Employer and the Provider.
- The Framework Particulars set out a list of the tasks that may be required of the Provider and the contractual terms (the 'Underlying Contract') that will govern any tasks that are carried out.
- The Framework Agreement also establishes a 'supplemental and complementary framework of provisions' to encourage the Parties to collaborate to achieve the Framework Objectives (3.1).
- When the Employer requires a Task or Tasks to be undertaken, it issues an 'Enquiry' (4.3). The Provider responds with a price for the Tasks and any other information

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JCT FA16

requested (4.4). If the Employer accepts the response, it issues an Order (4.6). The Provider signs and returns a copy of the Order (4.7.1).

- The Provider undertakes the Task in compliance with the Order, the Framework Agreement and the Underlying Contract (4.7.2).
- Until an Order is issued, the Provider is under no obligation to undertake any work. Conversely, unless the Framework Particulars indicate otherwise, the Employer is under no obligation to confer any Tasks on the Provider, and reserves the right to award the Tasks to other firms, if it wishes (4.1).
- The nine Framework Objectives include 'greater predictability of out-turn costs and programme', 'improvements in environmental performance', 'right first time with zero defects' and the avoidance of disputes (5).
- There is an optional provision allowing for the use of Performance Indicators; if this is to be used it must be indicated in the Framework Particulars (21.1). The provision includes for monitoring of the Provider's progress against the Performance Indicators, and for presenting it with a report on completion of the Tasks. There is no provision for a bonus or penalty as a result of the performance; this would need to be incorporated in the Underlying Contract. The guide usefully sets out a range of example performance indicators intended as a starting point for the Parties to develop their own.
- Transparency of management arrangements is emphasised – each Party is to provide the other with an organisation and management diagram of its internal structure (8).
- Collaborative working (9), sharing of information and know-how (11) are all included.
- The Provider is to endeavour to ensure that members of its Supply Chain 'embrace and adhere to' the principles of collaborative working set out in the Agreement and, where practicable, engage them on terms reflecting those principles (10).
- The Provider must consult the Supply Chain on essential aspects of the Project, eg design development and early warning (10).

2 Documents

- The Framework Agreement comprises 28 clauses, Framework Particulars, an attestation section and three annexes.
- There is no definition of 'contract documents' or 'framework documents'. The Framework Agreement is to be interpreted according to the rules set out in clause 2.2. It supplements and complements the Underlying Contract, but where there are conflicts between the two documents, the terms of the Underlying Contract prevail.

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- The three annexes are as follows: Annex 1, an enquiry form that refers to 'specific Tasks that we are considering calling-off'; Annex 2, a model Order, to be used to call-off Tasks; and Annex 3, the Pricing Documents.
- Annex 1 refers to draft Recitals, Articles and Contract Particulars that will form part of the Underlying Contracts.
- A list of definitions is included (1.1). Notable among these are definitions of OJEU Notice, PC Regulations, Tasks and Underlying Contracts.
- The Parties must endeavour to agree a communications protocol (12).
- Rights of third parties under the Contracts (Rights of Third Parties) Act 1999 are expressly excluded in relation to the Framework Agreement, although it is acknowledged that these may arise in respect of the Underlying Contracts (7).

3 Control: time

- A Framework Start Date and Framework End Date are entered in the Framework Particulars; the 'Framework Term' is defined as the period between these two dates, or between the start date and the date the Framework Agreement is terminated, whichever occurs first (1.1).
- No Tasks with a likely period of more than 12 months may be instructed within the final three months of the Framework End Date (22.1).
- Greater predictability of programme is one of the Framework Objectives (5.1.3) and the Parties are required to impress upon all personnel the importance of working collaboratively to achieve this (9.1).
- Prior to entering into any Underlying Contract, the Provider must undertake a risk analysis with the other Project Participants, which includes identifying any matter that might have an adverse effect on the programme (14.1). The Employer then prepares a risk allocation schedule or matrix, to be periodically reviewed and updated (14.2).
- Both Parties are required to promptly warn the other of any matters which may affect the programme of any Task (19) and to adopt a team approach to problem solving (20).

4 Control: quality

- The quality of the work to be carried out could be defined under the Tasks and the detailed procedures for inspections, tests, rectification of defects, etc will be set out in the Underlying Contracts.
- Improvements in quality and 'right first time with zero defects' are two of the framework objectives (5.1) and the Parties are required to impress upon all personnel the importance of working collaboratively to achieve this (9.1).

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- The Provider's risk analysis must identify any matter that might have an adverse effect on the 'out-turn' quality of the Tasks (14.1).
- Both Parties are required to promptly warn the other of any matters which may affect the quality of any Task (19) and to adopt a team approach to problem solving (20).

5 Control: cost

- Annex 3 refers to Pricing Documents that have been agreed between the Parties and form part of the Framework Agreement.
- Following an 'enquiry', the Provider submits a price for the Tasks to be carried out and this price must be calculated in accordance with the Pricing Documents (4.5). Once agreed, this price will normally form the basis of the contract sum and/or means of calculating amounts due under the Underlying Contract.
- The Provider's risk analysis must identify any matter that might have an adverse effect on the 'out-turn' cost of the Tasks (14.1).
- The Provider is encouraged to suggest measures which, if implemented, would result in financial benefit to the Employer (17.1). The Employer and Provider negotiate the Provider's share of the benefits, if implemented (there is no prior agreement as to shares) (17.3).
- The Parties are to endeavour to agree the cost of any changes before implementation (18).
- Both Parties are required to promptly warn the other of any matters which may affect the 'out-turn' cost of any task (19) and to adopt a team approach to problem solving (20).

6 Insurance

- There is no reference to insurance; the requirements for insurance would be those set out in the Underlying Contracts.

7 Termination

- Either Party may terminate the Agreement with one month's notice, except that there is no right to terminate within 12 months of the Framework Start Date (22.2). There is no requirement to state reasons for the termination and no restriction on the reasons or circumstances that may give rise to the termination.
- Any termination does not affect any Underlying Contract and the Agreement states that the Parties should continue to perform any Tasks that have been called-off before the Termination Date 'as if the Framework Agreement had never been entered into' (22.3).

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JCT FA16

8 Dispute avoidance and resolution

- Disputes relating to any Task or Tasks are resolved by the dispute resolution mechanisms set out in the relevant Underlying Contract (23.1 and 23.2).
- Where the dispute relates solely to matters set out in the Framework Agreement, and not to the Tasks, then clauses 24 to 27 of the Framework Agreement apply, covering mediation, adjudication, arbitration and legal proceedings (23.3).
- Clause 24 enables either Party to suggest that mediation is used. The procedures for appointing the mediator and conducting the mediation are to be agreed between the Parties.
- If clause 25 applies, either Party may at any time refer a dispute to adjudication in accordance with the Scheme for Construction Contracts (England and Wales) Regulations 1998 (reflecting Part II of the Housing Grants, Construction and Regeneration Act 1996, which gives either Party a statutory right to refer any difference or dispute arising out of the contract to adjudication).
- If the Parties wish disputes to be resolved by arbitration and not legal proceedings, then this must be indicated in the Framework Particulars. Any arbitration is to be conducted according to the JCT Construction Industry Model Arbitration Rules (26).
- If arbitration is not selected in the Framework Particulars, then the final method of resolving disputes will be by legal proceedings (27).

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JCT FA16

This contract?

If considering using FA16, the following points should be borne in mind.

This is not a standalone contract, but an arrangement whereby future packages of work and/or services may be let on pre-agreed prices and terms. It is a useful arrangement for the employer in that, once set up, it is possible to arrange for contracts to be awarded without having to tender them competitively, as the prices and terms have already been agreed in principle.

From the provider's point of view, there is no guarantee that any work will be awarded (unless specific tasks are identified in the framework particulars) and the prices that have been agreed are binding. Nevertheless, in situations where there is a reasonable probability that the provider will be awarded some call-off contracts, it provides an efficient system as there will be no need to bid or negotiate the terms or the prices for the work. The obligations set out in the framework agreement apply to the provisions of tasks and therefore will not impact on the provider until it is sent an enquiry or awarded a contract (for example, there is no obligation to meet on a regular basis to discuss how the framework objectives might be achieved).

FA16 is relatively short and straightforward and, being a two-party agreement (unlike, say, a framework alliancing contract), does not incur any potential liability to third parties. The relationship between the framework agreement and the underlying contract is clearly set out.

References and further reading

JCT Framework Agreement 2016
JCT Framework Agreement Guide 2016

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JCT PCSA16

Joint Contracts Tribunal Ltd

Pre-Construction Services Agreement (General Contractor) 2016 (PCSA16)

This agreement is intended for use in the context of design-build procurement, to appoint a contractor to undertake services before the main contract is let. This would typically take place during a two-stage tender process. The services must be listed by the parties (there is no standard schedule), as well as the fees for those services. The contract also includes a requirement to submit a second stage tender, and the particulars must identify the procedure for this and the form of construction contract under which the project will ultimately be let. The agreement requires the contractor to work cooperatively with other project team members to achieve the client's stated requirements for the project, and also includes provisions whereby the contractor agrees that, if awarded the project, it will accept the novation of specified consultants and specialists. The contractor is not liable for any design services during this period unless and until it is awarded the main contract.

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Background

A pre-construction services agreement (PCSA) is a contract to engage a contractor to provide services before the point where a main contract is let and construction work begins. This often takes place in the context of a two-stage tender process.

Two-stage tendering developed for many reasons, a key one being the desire to integrate the supply chain into a project team at an early point in the project. This allowed the employer to tap into the contractor's expertise and gain advice on matters such as cost and buildability. In addition, it offers significant benefits to the contractor. Design and build procurement usually requires contractors to prepare detailed proposals at tender stage, and they are often unwilling to devote the necessary resources to doing this in a situation where they are tendering competitively and have a limited chance of securing the project (two-stage tendering became popular during 2005 and 2006, when work became more readily available). By this process, a contractor could become involved at an early stage and thereby increase its chances of winning the work.

In a two-stage tender process, for the first stage there is little detailed project information available and contractors compete on the basis of their track record and expertise, together with management costs, profit and sometimes with some limited rates for work and materials.

During the second stage, the successful contractor works with the client and other consultants (the project team) to develop the design to meet the client's requirements. Once the package of information is considered sufficiently complete, the contractor submits a tender for undertaking the project (this is usually limited to

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JCT PCSA16

one contractor, but is sometimes done competitively). If the tender is acceptable, the contractor will be appointed for the project, usually on the basis of a design-build contract.

In 2008, the JCT published its PCSA, the first publisher to do so. The JCT describes this agreement as one of its collection of documents 'designed specifically to facilitate where a collaborative methodology is desired on a project'. The 2008 edition was republished in 2011, along with the rest of the JCT suite. The current edition was published in 2017.

PCSA16 incorporated provisions of the JCT Public Sector Supplement relating to transparency and building information modelling (BIM) and provisions reflecting aspects of the Public Contracts Regulations 2015, simplified the payment provisions and made various minor adjustments to drafting.

Structure

The total document runs to around 30 pages, the terms covering ten pages and the particulars a further ten. There are six pages of helpful guidance notes at the back of the form.

There are six recitals. The clauses are set out in section-headed format and include: definitions and interpretation; contractor's general obligations; employer's general obligations; representatives and contractor's key personnel; additional services, fee adjustment, etc; payment; insurance; use of contractor's information, confidentiality, etc; assignment and novation; suspension by the employer, termination, adjudication and the Public Contracts Regulations.

Unusually for JCT documents, the contract particulars and the attestation sections are at the back of the form. There are two annexes: annex A, which sets out the fees and expenses, and annex B, which lists the pre-construction services.

Use

The JCT describes PCSA16 as appropriate: 'For the supply of pre-construction services by a Contractor selected under a two-stage tendering procedure where the main contract is to be the JCT Standard Building Contract, Design and Build Contract, Major Project Construction Contract, Intermediate Building Contract or Intermediate Building Contract with contractor's design'. The JCT also suggests that it would be suitable in a JCT Construction Management procurement, for the provision of pre-construction services by prospective trade contractors, but not with the JCT Management Building Contract.

As well as setting out the terms under which the services are provided, PCSA16 also sets out the criteria to be met in preparing the second stage tender and the form of construction contract to be entered into for the construction project, including any amendments.

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PCSA16 can be used whether or not the contractor is to be responsible for any design work and by private and local authority clients. Particularly of note are the provisions whereby, under PCSA16, the contractor agrees that it will accept the novation of other team members or specialists, should it be awarded the project contract.

PCSA16 should not be used for the appointment of consultants or specialists. In these situations the parties should consider the JCT Pre-Construction Services Agreement (Specialist) 2016.

Synopsis

1 Roles

- The Parties to the contract are the Employer and the Contractor, as identified in the Agreement.
- The Contractor's principal duty is to perform Pre-Construction Services in accordance with the Employer's Requirements, the Statutory Requirements and the Programme (2.1).
- It is the Contractor's duty to perform the services in accordance with the Statutory Requirements (2.1).
- There is no specific mention of the CDM Regulations, but the general duty to comply with Statutory Requirements would extend to those regulations, for example if the Contractor could be considered a designer under the regulations. A Principal Designer and Principal Contractor must be identified in the Third and Fourth Recitals.
- The Contractor is required to liaise and cooperate fully with all other members of the Project Team (2.3).
- The Employer is required to identify an Employer's Agent for the pre-construction phase, and to notify the Contractor if this changes (Second Recital). The Employer's Agent's authority and role are defined under the agreement (4.1).
- The Contractor is required to appoint a representative and key personnel for the pre-construction phase, who are identified in the Particulars. These may not be replaced without the Employer's prior consent (4.2).
- The Employer may require that the Contractor's Representative or any of its key personnel are removed if they perform unsatisfactorily (4.3).
- Sub-contracting any of the pre-construction services requires the Employer's consent. The Contractor is fully responsible for any sub-contracted work (2.6).
- Neither the Employer nor the Contractor may assign the Agreement, or any rights under it, without the other's consent (9.1).
- There is an optional provision whereby the Parties can agree that the Contractor will enter into a novation agreement with identified members of the consultant team,

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JCT PCSA16

or identified specialists or suppliers with whom an order has been placed, once the design-build contract is let (9.2).

2 Documents

- There is no definition of contract documents; therefore these would include the form and whatever documents it incorporates by reference in the Particulars. The Contract states that nothing in any of those documents can override or modify the Agreement (1.2.1). Other than this there are no provisions for dealing with discrepancies between these documents.
- A list of relevant definitions is set out (1.1). This includes the term 'Pre-Construction Services', which are those listed by the Parties in Annex B. The Annex gives broad headings as the types of services to be provided, but the detailed requirements must be set out by the Parties.
- Rules for interpretation are set out, including a gender bias clause, and that a 'person' refers to an individual, firm, partnership, company and any other body corporate (1.2.2).
- Rights of third parties under the Contracts (Rights of Third Parties) Act 1999 are specifically excluded (1.3).

3 Control: time

- The Contractor is required to perform the Pre-Construction Services in accordance with the Programme identified in the Particulars (2.1).
- If the Contractor fails to complete the Pre-Construction Services in accordance with the Programme, this would be a breach of contract which may entitle the Employer to claim damages (there are no provisions for liquidated damages).
- The fees for the services are to be adjusted if the Contractor is delayed by events which are beyond its control and related to the Project (5.2.2).
- Where the Contractor wishes to claim additional time due to providing additional services, or to any delaying event as set out in clause 5.2, it must notify the Employer with details (5.3) and 'a fair adjustment of time shall be made' (5.4).

4 Control: quality

- In undertaking the services, the Contractor is required to exercise the skill, care and diligence reasonably to be expected of a Contractor experienced in projects of similar size, scope and complexity (2.1.1).
- Where the services include design work, the Contractor has no liability to the Employer for this design unless and until the Main Contract is entered into (2.8).
- The Contractor must comply with all instructions issued by the Employer (2.2).

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- The Contractor is forbidden from selecting or recommending materials that do not comply with the guidance in *Good Practice in the Selection of Construction Materials*, published by the British Council for Offices (2.4).

5 Control: cost

- The Fee for the services to be provided and the Reimbursable Expenses are set out in Annex A.
- The Employer may instruct the Contractor to provide additional services to the extent that they are within the scope of the Project and the Contractor's competence.
- Where the Contractor wishes to claim any additional fee, loss and expense or additional time due to providing additional services, or to any delaying event as set out in clause 5.2, it must notify the Employer with details (5.3). Upon receiving such notification, the adjustment is agreed between the Employer and the Contractor or, if not agreed, the Employer decides on the adjustment (5.4).
- The Contractor may make an application for payment to the Employer at the application dates or the stages/milestones set out in Annex A, stating the amount due and the basis for its calculation.
- The due dates for interim payment are the application dates or the stages/milestones stated in Appendix A, or the date of application by the Contractor, if received later (6.3.1).
- Not later than five days after each due date the Employer issues a payment notice to the Contractor stating the sum that it considers due to the Contractor on the due date and the basis for its calculation (6.4.1).
- The final date for payment is 14 days from its due date (6.3.2). The sum to be paid, subject to any 'pay less notice', is the sum stated on the payment notice (6.4.2).
- Where the Employer intends to pay less than the amount stated in a payment notice or interim payment application it shall, not later than five days before the final date for payment, issue a 'pay less notice' stating the amount it considers due and the basis for its calculation (6.4.3).
- Failure to pay by the final date for payment will attract simple interest of 5 per cent over the current base rate (6.5 and 1.1) and can give the Contractor a right to suspend some or all of its obligations with a right to recover reasonable costs and expenses incurred as a result of such suspension. Suspension is to be preceded by the service of a seven-day notice and may only progress where there is a failure to remedy the non-payment after the seven-day period (6.6).

6 Insurance

- The Contractor is required to carry Professional Indemnity insurance to cover its liability for design, details of which should be set out in the Particulars, provided it remains available at commercially reasonable rates (7.1.1).

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JCT PCSA16

- The Contractor is also required to maintain Public Liability insurance, details of which should be set out in the Particulars (7.1.2).
- Both types of insurance are dependent on the Particulars having set out the requirements; if no amount of cover is stated, the insurance is not required.

7 Termination

- The Employer is allowed to suspend the Contractor's performance of the whole or any part of the Pre-Construction Services at any time, subject to issuing a 14-day notice (10.1). The Contractor is entitled to payment as set out in that clause. The Employer may at any time within six months (or any period set out in the Particulars) instruct the Contractor to recommence the services, and the Contractor must comply as soon as is reasonably practicable. The Employer must pay the Contractor the costs of recommencing (10.2).
- If the Employer suspends the whole or a substantial proportion of the services and does not issue a recommencement instruction within six months (or any period set out in the Particulars), the Contractor may terminate its employment, provided it issues a 14-day warning notice (10.4).
- The Employer may terminate the Contractor's employment at will by a 14-day notice (10.5.1).
- Either Party may terminate the Contractor's employment with immediate effect in the event of insolvency (10.5.2).
- Either Party may terminate the Contractor's employment with immediate effect if the other Party commits a material breach which it does not remedy within seven days of notification (10.5.3).
- The Employer may also terminate the Contractor's employment with immediate effect for grounds set out in regulations 73(1)(a), 73(1)(b) and 73(1)(c) of the Public Contracts Regulations 2015 (10.5.4).
- The respective rights and duties of the Parties following termination are set out in detail (10.6).

8 Dispute avoidance and resolution

- The Parties have a contractual right to refer any difference or dispute arising out of the Contract to adjudication (10.7; this would also be a statutory right under the Housing Grants, Construction and Regeneration Act 1996). The procedure for adjudication is that set out in the Scheme for Construction Contracts (England and Wales) Regulations 1998, save that the name of the Adjudicator and the nominating body may be entered in the Particulars.
- There is no reference to arbitration; therefore, unless the Parties enter into an arbitration agreement, the final resolution of any dispute will be in the courts.

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JCT PCSA16

This contract?

If considering using the JCT PCSA, the following points should be borne in mind.

This agreement is for use where an employer wishes to appoint a contractor to undertake services before a main contract is let. This would typically occur in relation to design-build procurement, and during a two-stage tender process. It would also be suitable for the provision of pre-construction services by prospective trade contractors in a construction management arrangement.

The services must be listed by the parties (there is no standard schedule), as well as the fees for those services.

The contractor agrees that, if awarded the project, it will accept the novation of specified consultants and specialists.

References and further reading

JCT Pre-Construction Services Agreement (General Contractor) 2016

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JCT PCSA/SP16

Joint Contracts Tribunal Ltd

Pre-Construction Services Agreement (Specialist) 2016 (PCSA/SP16)

This agreement is intended for use in the context of design-build procurement, when an employer or contractor wishes to appoint a specialist contractor to undertake services before the main contract is let. This would typically take place during a two-stage tender process. The services must be listed by the parties (there is no standard schedule). The agreement requires the specialist to work cooperatively with other project team members to achieve the client's stated requirements for the project. There is an optional provision whereby the specialist may be required to submit a second stage tender. Where the specialist is engaged by the employer, there is provision for the benefit of its second stage tender to be assigned to the contractor. The specialist is not liable for any design services during this period unless and until it enters into a subcontract with the contractor or a collateral warranty with the employer.

Background

This version of the PCSA was first published in 2008 alongside the JCT Pre-Construction Services Agreement (General Contractor) (for the background to this and two-stage tendering, see the commentary on PCSA/16 above). This PCSA was then republished in 2011, along with the rest of the JCT suite. The current edition was published in 2017.

The JCT describes this agreement as one of its collection of documents 'designed specifically to facilitate where a collaborative methodology is desired on a project'.

The 2016 edition incorporated provisions of the JCT Public Sector Supplement relating to transparency and building information modelling (BIM) and provisions to reflect aspects of the Public Contracts Regulations 2015, and simplified the payment provisions, as well as making various minor adjustments to drafting.

Structure

The total document runs to around 30 pages, the terms covering ten pages and the particulars a further ten. There are six pages of helpful guidance notes at the back of the form.

There are six recitals. The clauses are set out in section-headed format and include: definitions and interpretation; specialist's general obligations; purchaser's general obligations; representatives and specialist's key personnel; additional services, fee adjustment, etc; payment; insurance; use of specialist's information, confidentiality, etc; assignment; suspension by the purchaser, termination, adjudication and the Public Contracts Regulations.

Unusually for JCT documents, the particulars and the attestation sections are at the back of the form.

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JCT PCSA/SP16

There are two annexes: annex A, which sets out the fees and expenses, and annex B, which lists the pre-construction services.

Use

The JCT describes PCSA/SP16 as appropriate: 'for the supply of pre-construction services by a specialist to either an employer or the actual or prospective main contractor … prior to entry into a sub-contract for construction or installation work, and where the main contract is to be the JCT Standard Building Contract, Design and Build Contract, Major Project Construction Contract, Management Building Contract, Intermediate Building Contract or Intermediate Building Contract with contractor's design'.

As well as setting out the terms under which the services are provided, PCSA/SP16 also sets out the requirements for the second stage tender. The agreement can be used whether or not the specialist is to be responsible for any design work and by private and local authority clients. Under PCSA/SP16, the specialist agrees that it will accept the benefit of its second stage tender being assigned to the main contractor.

PCSA/SP16 should not be used for the appointment of main contractors. In these situations, the parties should consider the JCT Pre-Construction Services Agreement (General Contractor) 2016.

Synopsis

1 Roles

- The Parties to the Agreement are the Purchaser and the Specialist, as identified in the Agreement. The recitals require a deletion to indicate whether the Purchaser is the Employer or the intended Main Contractor for the Project.
- The Specialist's principal duty is to perform pre-construction services in accordance with the Purchaser's Requirements, the Statutory Requirements and the Programme (2.1).
- It is the Specialist's duty to perform the services in accordance with the Statutory Requirements (2.1).
- There is no specific mention of the CDM Regulations, but the general duty to comply with the Statutory Requirements would extend to those regulations, for example if the Specialist is to be considered a designer under the regulations. A Principal Designer and Principal Contractor must be identified in the Fifth and Sixth Recitals.
- The Specialist is required to liaise and cooperate fully with all other members of the Project Team (2.3).
- The Purchaser is required to identify a representative in the Particulars for the pre-construction phase and to notify the Specialist if this changes. The representative's authority and role are defined under the agreement (4.1).

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JCT PCSA/SP16

- The Specialist is required to appoint a representative and key personnel in the Particulars for the pre-construction phase and may not replace them without the Purchaser's consent (4.2).
- The Purchaser may require that the Specialist's Representative or any of its key personnel are removed if they perform unsatisfactorily (4.3).
- Sub-contracting any of the pre-construction services requires the Purchaser's consent. The Specialist is fully responsible for any sub-contracted work (2.6).
- Neither the Purchaser nor the Specialist may assign the Agreement, or any rights under it, without the other's consent (9.1).
- The benefit of any second stage tender by the Specialist may be assigned to, and is enforceable by, the appointed Main Contractor (9.2).

2 Documents

- There is no definition of contract documents, therefore these would include the form and whatever documents it incorporates by reference in the Particulars. The Agreement states that nothing in any of those documents can override or modify the Agreement (1.2.1). Other than this there are no provisions for dealing with discrepancies between these documents.
- A list of relevant definitions is set out (1.1). This includes the term 'Pre-Construction Services', which are those listed by the Parties in Annex B, or instructed under clause 5.1. Annex B gives broad headings as the types of services to be provided, but the detailed requirements must be set out by the Parties.
- Rules for interpretation are set out, including a gender bias clause and that a 'person' refers to an individual, firm, partnership, company and any other body corporate (1.2.2).
- The Specialist is to notify the Purchaser if it finds any conflict between an instruction and the Statutory Requirements or the Purchaser's Requirements, and then meet with the Purchaser with a view to resolving the matter (2.2.2).
- Rights of third parties under the Contracts (Rights of Third Parties) Act 1999 are specifically excluded (1.3).

3 Control: time

- The Specialist is required to perform the pre-construction services in accordance with the Programme identified in the Particulars (2.1).
- If the Specialist fails to complete the Pre-Construction Services in accordance with the Programme this would be a breach of contract which may entitle the Purchaser to claim damages (there are no provisions for liquidated damages).

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JCT PCSA/SP16

- The fees for the services are to be adjusted if the Specialist is delayed by events beyond its control which are related to the Project (5.2.2).
- Where the Specialist wishes to claim additional time due to providing additional services, or to any delaying event as set out in clause 5.2, it must notify the Purchaser with details (5.3) and 'a fair adjustment of time shall be made' (5.4).

4 Control: quality

- In undertaking the services, the Specialist is required to exercise the skill, care and diligence reasonably to be expected of a specialist contractor experienced in the types of work to which the services relate for projects of similar size, scope and complexity (2.1.1).
- Where the services include design work, the Specialist has no liability to the Purchaser for this design unless and until a sub-contract is entered into (where the Purchaser is the Main Contractor) or until the Specialist is required to enter into a collateral warranty (where the Purchaser is the Employer) (2.8).
- The Specialist must comply with all instructions issued by the Purchaser (2.2).
- The Specialist is forbidden from selecting or recommending materials that do not comply with the guidance in *Good Practice in the Selection of Construction Materials* published by the British Council for Offices (2.4).

5 Control: cost

- The Fee for the services to be provided and the Reimbursable Expenses are set out in Annex A.
- The Purchaser may instruct the Specialist to provide additional services to the extent that they are within the scope of the Project and the Specialist's competence (5.1).
- Where the Specialist wishes to claim any additional fee, loss and expense or additional time due to providing additional services, or to any delaying event as set out in clause 5.2, it must notify the Purchaser with details (5.3). Upon receiving such notification, the adjustment is agreed between the Purchaser and the Specialist or, if not agreed, the Purchaser decides on the adjustment (5.4).
- The Specialist may make an application for payment to the Purchaser at the application dates or the stages/milestones set out in Annex A, stating the amount due and the basis for its calculation (6.2).
- The due dates for interim payment are the application dates or the stages/milestones set out in Annex A, or the date of application by the Specialist, if received later (6.3.1).
- The final date for payment is 14 days from its due date (6.3.2).

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JCT PCSA/SP16

- Not later than five days after each due date, the Purchaser issues a payment notice to the Specialist stating the sum that it considers due to the Specialist on the due date and the basis for its calculation (6.4.1).
- The sum to be paid, subject to any 'pay less notice', is the sum stated on the payment notice or, if no notice is given, the amount in the payment application (6.4.2).
- Where the Purchaser intends to pay less than the amount stated in a payment notice or payment application, it shall, not later than five days before the final date for payment, issue a 'pay less notice', stating the amount it considers due and the basis for its calculation (6.4.3).
- Failure to pay by the final date for payment will attract simple interest of 5 per cent over the current base rate (6.5 and 1.1) and can give the Specialist a right to suspend some or all of its obligations with a right to recover reasonable costs and expenses incurred as a result of such suspension. Suspension is to be preceded by the service of a seven-day notice and may only progress where there is a failure to remedy the non-payment after the seven-day period (6.6).

6 Insurance

- The Specialist is required to carry Professional Indemnity insurance to cover its liability for design, details of which should be set out in the Particulars, provided it remains available at commercially reasonable rates (7.1.1).
- The Specialist is also required to maintain Public Liability insurance, details of which should be set out in the Particulars (7.1.2).
- Both types of insurance are dependent on the Particulars having set out the requirements; if no amount of cover is stated, the insurance is not required.

7 Termination

- The Purchaser is allowed to suspend the Specialist's performance of the whole or any part of the pre-construction services at any time, subject to issuing a 14-day notice (10.1). The Specialist is entitled to payment as set out in that clause. The Purchaser may, at any time within six months (or any period set out in the Particulars), instruct the Specialist to recommence the services and the Specialist must comply as soon as is reasonably practicable. The Purchaser must pay the Specialist the costs of recommencing (10.2).
- If the Purchaser suspends the whole or a substantial proportion of the services and does not issue a recommencement instruction within six months (or any period set out in the Particulars), the Specialist may terminate its employment, provided it issues a 14-day warning notice (10.4).
- The Purchaser may terminate the Specialist's employment at will by a 14-day notice (10.5.1).

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JCT PCSA/SP16

- Either Party may terminate the Specialist's employment with immediate effect in the event of insolvency (10.5.2).
- Either Party may terminate the Specialist's employment with immediate effect if the other Party commits a material breach which it does not remedy within seven days of notification (10.5.3).
- The Purchaser may also terminate the Specialist's employment with immediate effect for any of the grounds set out in regulation 73(1) of the Public Contracts Regulations 2015 (10.8.3).
- The respective rights and duties of the Parties following termination are set out in detail (10.6).

8 Dispute avoidance and resolution

- The Parties have a contractual right to refer any difference or dispute arising out of the Agreement to adjudication (10.7; this would also be a statutory right under the Housing Grants, Construction and Regeneration Act 1996). The procedure for adjudication is that set out in the Scheme for Construction Contracts (England and Wales) Regulations 1998, save that the name of the Adjudicator and the nominating body may be entered in the Particulars.
- There is no reference to arbitration; therefore, unless the Parties enter into an arbitration agreement, the final resolution of any dispute will be in the courts.

This contract?

If considering using JCT PCSA/SP, the following points should be borne in mind.

This agreement is for use where an employer or contractor wishes to appoint a specialist contractor to provide services prior to entry into a subcontract for construction or installation work. This would typically occur in relation to design-build procurement, and during a two-stage tender process. However, it may also be used in relation to other forms, such as the JCT SBC, prior to the specialist being listed or named in the main contract. The services must be listed by the parties (there is no standard schedule), as well as the fees for those services.

There is an optional provision whereby the specialist may be required to submit a second stage tender. Where the specialist is engaged by the employer, there is provision for the benefit of its second stage tender to be assigned to the contractor.

References and further reading

JCT Pre-Construction Services Agreement (Specialist) 2016

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NEC4

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The New Engineering Contract was first published by the Institution of Civil Engineers in 1993. The second and subsequent editions of the form are known simply as the NEC, with the second edition, NEC2, published in 1995. The latest edition is NEC4, which commenced publication in 2017 and was completed in 2018. The NEC4 suite can be used under various procurement routes, including design-bid-build (and with contractor's design), design-build, design-build-operate and alliancing.

NEC4 Engineering and Construction Contract (ECC)

NEC4 Engineering and Construction Short Contract (ECSC)

NEC4 Alliance Contract (ALC)

NEC4 Design Build and Operate Contract (DBO)

NEC4 Framework Contract (FC)

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NEC4 ECC

Institution of Civil Engineers

NEC4 Engineering and Construction Contract (ECC)

The NEC4 is an interlocking suite of contracts. Within the suite, the Engineering and Construction Contract (ECC) is the main construction contract, and the Engineering and Construction Subcontract supports subcontracting on projects using this form. The Engineering and Construction Short Contract is a minor (small project) version of the main contract and is complemented by the Engineering and Construction Short Subcontract.

In an attempt to stimulate good management, emphasis is laid on the contractual importance of effective programming. The 'Early Warning Register' in NEC4, which was first introduced in NEC3 as the 'Risk Register', is a further tool to encourage the early identification and management of potential problems.

Background

The NEC4 is a fourth edition of what was initially called the New Engineering Contract (NEC). The NEC was a bold and major initiative in the drafting of construction contracts. This was an entirely new 'clean sheet' approach to drafting construction contracts undertaken for the Institution of Civil Engineers. It was prepared by a panel of engineers and lawyers chaired by Dr Martin Barnes of Coopers and Lybrand, London.

The result was a form of contract that is adaptable and suitable for use under a range of procurement routes, including design-bid-build, design-build and management contracting, for both civil engineering and building works.

The original NEC was marketed on the basis of its three key attributes:

- Flexibility: The original NEC comprised one all-purpose document, suitable for traditional procurement, design-build or management contracts. It was suitable for most types of civil engineering and building work, from large-scale projects down to domestic-scale work. In practice, it was used mainly in high-value, large-scale public projects. Drafted as a head contract, it could be used both under UK law and overseas.
- Clarity: This form aimed to be clear and easily understandable, and therefore likely to lead to fewer disputes. It was drafted using plain language and relatively short clauses to achieve this purpose.
- Good management on the part of all parties: It was felt that there should be an end to adversarial posturing by bringing into the contract an obligation for frank and open discussion of problems as they arose, thereby minimising the risk of disputes escalating to the point where time and cost overruns became inevitable. It was

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NEC4 ECC

further thought desirable to introduce incentives for good performance and early completion.

Sir Michael Latham bestowed high praise on the original NEC in his 1994 report. After listing what he considered to be desirable features that should be present in all modern construction contracts, he stated 'the approach of the New Engineering Contract is extremely attractive' and that it contains 'virtually all these assumptions of best practice'. He went on to advocate certain changes to the NEC, some of which were as follows:

- that the name should be changed to New Construction Contract (hence the change to ECC)
- that there should be provision for a secure trust funding
- that there should be prompt payment provision for subcontractors
- that there should be affirmation by the parties that all dealings are to be on a fair basis
- that core clauses should be left unamended and only compatible subcontracts used
- that terms of appointment for consultants and adjudicators should interlock with the contract
- that consideration should be given to a short and simpler minor works variant (now available).

The Latham Report also recommended that 'Government Departments should begin changing to the NEC' and that 'the use of NEC (amended) by private sector clients should be strongly promoted'.

Following the Latham Report, the NEC was widely taken up by the construction and engineering industries and used on projects in various sectors and in many parts of the world. An example is that the English National Health Service required an amended version of NEC2 to be used on its ProCure21 projects.

The third edition introduced some significant changes to the suite. New concepts – such as the use of a risk register, key dates and key performance indicators, and third party rights – were introduced, as well as amendments required by changes to legislation, such as in the adjudication and payment provisions.

As the NEC benefitted from the Latham Report's recommendation, it is unfortunate that the NEC4 still includes the use of Z options, which allow additional conditions of contract to be inserted. If such additions were to be substantive, the result could be a contract that is an amended standard form, or even a bespoke form. Either way, this would be against the Latham Report's recommendations.

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NEC4 ECC

The NEC4 suite of contracts includes updated editions of the following NEC3 forms:

- Engineering and Construction Contract
- Engineering and Construction Subcontract
- Engineering and Construction Short Contract
- Engineering and Construction Short Subcontract
- Supply Contract and Supply Short Contract
- Professional Service Contract
- Professional Service Short Contract
- Term Service Contract
- Term Service Short Contract
- Framework Contract.

The NEC4 suite also introduced the following new contracts:

- Professional Service Subcontract
- Term Service Subcontract
- Design Build and Operate Contract
- Dispute Resolution Service Contract (replacing the NEC3 Adjudicator's Contract)
- Alliance Contract (initially published in consultation form).

Structure

The NEC4 ECC comprises core clauses, main option clauses and secondary option clauses.

The core clauses are set out in nine sections and apply in all ECC contracts. The core clauses allow for a flexible amount of contractor design, enabling the form to be used in traditional design-bid-build (with or without contractor design), design-build and management procurement.

The main option clauses constitute six sets of clauses, A to F, which establish different pricing and payment systems: priced contract with quantities or activity schedule; target contract with quantities or activity schedule; cost reimbursable contract; or management contract. Main option clauses can include an activity schedule (for Options A or C) or a bill of quantities (for Options B or D).

The secondary option clauses are listed under 21 headings (Option X1–X22; X19 is not used) and may be incorporated or not as required. Some can only work in conjunction with certain main option clauses.

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NEC4 ECC

The secondary options can be incorporated as required to allow for: performance bonds; partnering; key performance indicators; advance payment; sectional completion; limitation of contractor's liability for design; fluctuations; retention; bonus for early completion; delay damages; low performance damages, etc. This allows the contract conditions to be tailored to the intended works.

The secondary option clauses can be incorporated to make provision for: price adjustment for inflation (X1); changes in the law (X2); multiple currencies (X3); parent company guarantee (X4); sectional completion (X5); bonus for early completion (X6); delay damages (X7); partnering (X12); performance bond (X13); advanced payment to the contractor (X14); limitation of contractor's design liability to using reasonable skill and care (X15); retention (X16); low performance damages (X17); limitation of liability (X18); key performance indicators (X20).

There are further possibilities for making the contract even more project specific by choosing the appropriate Y options (Y(UK)1 to Y(UK)3), the relevant W options (W1 to W3) for resolving and avoiding disputes, and additional conditions of contract can be inserted using the Z option.

When preparing the contract for use, it is first necessary to select one of the main options. The secondary options can then be considered and incorporated as appropriate. Once the make-up of the contract content has been determined, the statements of contract data can be completed. The core clauses are relatively brief, therefore the information carried in the 'Scope' and the 'Contract Data' becomes extremely important. Part one of the latter consists of information to be provided by the client, and part two is data to be provided by the contractor. Because of the number of options available, and the fact that data requirements will be related to the selected options, completion of the scope and the contract data needs to be precise and approached with great care.

The NEC Engineering and Construction Subcontract and the Professional Service Contract are meant to be used regardless of which main options are incorporated.

Use

The main options and secondary options of NEC4 ECC provide a substantial amount of flexibility, allowing the contract to be used for a variety of procurement routes, for example:

- design-bid-build ('traditional')
- design-bid-build with contractor design
- design-build
- management contracting (with main Option F)
- construction management
- partnering (with secondary Option X12) (multiple two-party arrangements).

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NEC4 ECC

Synopsis

1 Roles

- The Parties to the contract are the Client and the Contractor.
- Client – the Party entering into contract with the Contractor (in pre-NEC4 forms, this Party was referred to as the Employer).
- Contractor – the Party entering into contract with the Client.
- Project Manager – appointed by the Client to deal mainly with cost and time issues.
- Supervisor – appointed by the Client to deal with quality control matters.
- The intentions of the Parties as indicated in the Contract Documents should be evident from the core clauses, the choice of Option clauses and the Contract Data provided by the Client.
- The contractual spirit of mutual trust and co-operation is expressed in the 'General' section of the core clauses (10.2).
- The Contractor's main obligation is to Provide the Works in accordance with the Scope (20), which is defined in clause 11.2(16). It is important therefore to make certain that this information is full, clear and accurate.
- The contract allows for design by the Contractor (21) and deals with copyright in that design (22).
- There are clear rules relating to communications (eg instructions, certificates, submissions, records, etc) (13).
- Definition of the Site and information describing the Site are under clauses 11.2(17) and 11.2(18).
- Early warning is a significant requirement in the contract (15).
- An Early Warning Register is set up at the start of the project and includes items listed in the Contract Data. The Early Warning Register may be added to during the course of the project, and the Contractor or the Project Manager may require an early warning meeting to discuss the noted matters (15).
- Instructions are required from the Project Manager to resolve any ambiguities or inconsistencies (17).
- The Contractor is obliged not to do a Corrupt Act and to stop subcontractors or suppliers from doing so (18).
- The Contractor and the Project Manager are obliged to notify the other on becoming aware of anything in the Scope that is illegal (17.2).

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NEC4 ECC

- For design-build contracting, there is an expanded secondary Option (X15) on Contractor's Design. This deals with: professional indemnity insurance requirements; aligning the Contractor's standard of skill and care for design to that commonly used by professionals designing similar works; copyright licences; and retention of documents.
- The Contractor is responsible for co-operation over providing information and the sharing of Working Areas is a contractual obligation (25).
- The Contractor must act in accordance with the health and safety requirements stated in the Scope (27.4).
- Title to plant, equipment and materials is normally vested in the Contractor, but may pass to the Client where the Supervisor marks goods and materials as being 'for the contract' (70.1). The subject of title is allocated a complete section of the core clauses (core section 7).
- NEC4 includes a new core clause (29) restricting the disclosure of confidential information relating to the project.
- There are two references to assignment. Under clause 28, either Party notifies the other of its intent to assign the benefits of, or its rights under, the contract to another party; and under clause 92.2 P2, the Client may instruct the Contractor to assign to it the benefit of contracts on termination of the Contractor's employment.
- For management contracting, main Option F should be chosen. Under Option F clause 20, the Contractor manages the Contractor's design, the provision of Site services and the construction and installation of the works. The Contractor may subcontract all of the above except for work stated in the Contract Data that the Contractor is to carry out. The Contractor advises on the practical implications of the design of the works and the subcontract arrangements. The Contractor prepares forecasts of Defined Costs (Option F, 11.2(25)) of all the work by subcontractors and by the Contractor.

2 Documents

- Scope is defined under clause 11.2(16). The Scope is information that specifies and describes the works or states any constraints on how the Contractor will Provide the Works. This will either be in the documents listed in the Contract Data or in instructions issued during the project.
- NEC4 incorporates a new secondary Option (X10) for the use of Information Modelling. It deals with issues related to the Information Model, ownership of information and liability of the Parties. NEC4 Practice Note 2: *How to use the CIC BIM Protocol with NEC4* (April 2018) sets out how the CIC Protocol can be incorporated into the NEC4 ECC by the selection of secondary Option X10 and the inclusion of the Protocol as the Information Model Requirements in the Scope.

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NEC4 ECC

- A new secondary Option X8 has also been inserted in NEC4, so that the Contractor gives undertakings (as opposed to collateral warranties) to Others, such as funders, purchasers etc, as stated in the Contract Data. There is also provision for subcontractors to provide undertakings to the Client and to Others should they be carrying out any of the works stated in the Contract Data as requiring undertakings. The undertakings are to be in the form set out in the Scope.
- Option Y(UK)3 is a contracting out of third party rights under the Contracts (Rights of Third Parties Act) 1999. It should be incorporated into the Contract Data for all contracts to which the law of England and Wales or Northern Ireland applies.
- Any project-specific additional conditions of contract can be entered under Option Z.

3 Control: time

- Starting and completion arrangements are straightforward and are stated under clause 30. Provisions for programme information are set out under clause 31, and for revising the programme under clause 32. Access to and use of the Site (possession of the Site) are covered under clause 33.
- A programme should be identified in the Contract Data, or otherwise submitted to the Project Manager by the Contractor. If the Contractor fails to produce a programme, 25 per cent of any amount that would otherwise be due to the Contractor is retained until the Contractor complies (50.5). The detail of information to be included in the programme is described under clause 31. Programmes may be revised subject to conditions (32).
- The Project Manager is empowered to issue instructions to stop or not start any work or to remove work from the Scope (34).
- The contract may stipulate Key Dates by which defined operations must be complete. This allows the work of one contractor to be dovetailed with that of another (where both are engaged under NEC4 contracts). Cost incurred by the Client through failure to meet a Key Date can be claimed against the Contractor in default (25.3).
- Procedures for the Client to use or take over part of the works early are subject to conditions. Possession of any part of the works, or the whole of the Site, is dependent upon certification by the Project Manager (35).
- The Project Manager can require the Contractor to submit a quotation for accelerating the works in order to achieve Completion ahead of the contract Completion Date (36).
- Where delay occurs due to certain intervening events, these may constitute 'compensation events' (60). Twenty compensation events are listed with precise requirements and additional compensation events can be included in the Contract Data. The Contractor is obliged to notify the Project Manager of such events and the Project Manager will decide whether compensation is due (61). The 'early warning'

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NEC4 ECC

requirement will be taken into account. Compensation events are afforded a complete section in the core clauses (section 6).

- The Project Manager may instruct the Contractor to submit a quotation to deal with the monetary losses associated with a delay. The quotation should include the effect on the Accepted Programme (62).
- Assessment of compensation events is a matter for the Project Manager in accordance with certain rules and procedures (63 and 64). The Project Manager must notify the Contractor of its decision.

4 Control: quality

- The early warning obligation can constitute a control mechanism (15).
- The Project Manager and the Supervisor are both given considerable powers, and both may delegate. The Project Manager is empowered to issue instructions to the Contractor relating to changes to the Scope or a Key Date (14).
- The Contractor must submit names, qualifications and experience of key people. Replacements are subject to acceptance by the Project Manager (24).
- The Project Manager may order the removal of an employee from any further connection with the particular contract (24.2).
- The Contractor must arrange for access to work being done, and to materials and plant in store, for the Project Manager, Supervisor and others named by the Project Manager (27.2).
- The Contractor must obey instructions, that are in accordance with the contract, from the Project Manager and the Supervisor (27.3).
- The Contractor is wholly responsible for the work of all subcontractors. All subcontractors are subject to acceptance by the Project Manager (26).
- Tests and inspections carried out by the Contractor may be observed by the Supervisor. The Supervisor may also order the Contractor to carry out tests and may carry out its own tests (41).
- The Supervisor may instruct the Contractor to search for Defects (43) and until the 'defects date' the Supervisor and the Contractor notify each other of any Defect. Whether or not the Supervisor notifies, the Contractor is obliged to correct Defects before the end of the 'defect correction period'. The defect correction period begins at Completion or, following Completion, when a Defect is notified (44).
- Where part of the works has been taken over by the Client, the Project Manager is to arrange access for the Contractor to correct Defects (44.4). Where it is agreed that Defects need not be corrected, then there may be changes to the Scope and a cost reduction (45).

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NEC4 ECC

- The contract makes no reference to assignment, other than the Contractor's obligation to assign the benefit of any contracts on termination of its employment (92.2 P2).

5 Control: cost

- The Contractor may propose a change to the Scope in order to reduce cost for the Client (16).
- The Project Manager must assess the amounts due to the Contractor at each assessment date. The intervals are included in the Contract Data (50).
- The Project Manager certifies a payment within one week of each assessment date, and each certified payment is made within three weeks of the assessment date, or within a different period if one is stated in the Contract Data. Interest is payable on amounts due but unpaid, and in respect of a Project Manager's certificate which is due but issued late. The interest rate is to be stated in the Contract Data (51).
- Secondary Option X16 (retention) now includes an optional provision for the use of a retention bond instead of having money retained (X16.3).
- Option Y(UK)2 (Housing Grants, Construction and Regeneration Act 1996) would apply to all contracts on NEC4 in the UK. It includes provisions for the use of 'pay less notices'.
- The Project Manager's certificate is the notice of payment to the Contractor and sets out the amount due on the relevant payment due date (the notified sum) and the basis on which the amount was calculated (Y2.2).
- The date on which payment becomes due is seven days after the assessment date, and the final date for payment is 14 days after the date on which payment becomes due (Y2.2).
- If either Party intends to pay less than the notified sum, that Party will issue a pay less notice not later than seven days (the prescribed period) before the final payment date, stating the amount it considers due and the basis for calculating it. No amount can be withheld under the contract unless a Party has issued a pay less notice (Y2.3).
- Suspension of performance by the Contractor in the event of the Client's failure to make proper payment is treated as a compensation event (Y2.5).
- There can be price adjustments for inflation (ie fluctuations) under secondary Option X1 (applicable only for main Options A to D), calculated on the basis of a Price Adjustment Factor.
- If the Project Manager corrects the Scope to make it comply with statute, this may be a compensation event.
- For NEC4, a new compensation event has been added in the core clauses (section 6: Compensation events) entitling the Contractor to claim for the cost of preparing a quotation for a proposed instruction that was not accepted by the Project Manager.

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- Additional compensation events may now be added by the Client in the Contract Data part one (60.1(20)).
- There is also a new secondary Option (X21) that enables the Contractor to make a proposal to change the Scope in order to reduce the cost of an asset over its life cycle.
- A further new secondary Option (X22) covers early contractor involvement. This Option is to be used only with main Options C: Target contract with activity schedule and E: Cost reimbursable contract.
- A new clause 53 (Final assessment) has been added in the NEC4 core clauses (section 5: Payment), setting out new procedures for agreeing final amounts due. The Project Manager makes an assessment of the final amount due and certifies a final payment no later than four weeks after the Supervisor issues the Defects Certificate, or thirteen weeks after the Project Manager issues a termination certificate (53.1). If the Project Manager fails to do this, the Contractor can issue its own final assessment (much like in JCT contracts) (53.2). The final assessment becomes conclusive if not challenged and referred to dispute resolution (53.3).

6 Insurance

- The standard liabilities ('risks' in NEC3) to be carried by the Client are itemised, and any additional liabilities to be carried by the Client may be entered in the Contract Data (80).
- Liabilities not itemised as being carried by the Client are to be carried by the Contractor (81).
- Insurance responsibilities are as tabled in clause 83 and additional insurances as stated in the Contract Data.
- The Contractor is to provide the insurances stated in the Insurance Table (83.3).
- All but the fourth insurance in the table (death of or bodily injury to employees of the Contractor) are in joint names.
- Where the Contractor insures, policies and certificates are subject to acceptance by the Project Manager (84).
- If the Contractor fails to insure as required by the contract, then the Client may insure and charge to the Contractor (85).
- Where the Client insures, policies and certificates must be submitted to the Contractor. If the Client fails to submit, then the Contractor may insure and charge to the Client (86).
- Details of insurance obligations and cover are to be stated in the Contract Data.

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NEC4 ECC

7 Termination

- Either Party wishing to terminate the Contractor's employment notifies the Project Manager and the other Party, giving reasons. If the reasons comply with the conditions of contract, the Project Manager issues a Termination Certificate (90).
- Valid reasons for termination by the Client and by the Contractor are set out in a Termination Table (90.2).
- Following the issue of the Termination Certificate, termination procedures are implemented as set out in the Termination Table. Payments which may be due on termination are as set out in the Termination Table.
- The Client may elect to complete the works itself or to employ another contractor, and may use any plant or materials to which it has title (92.1).

8 Dispute avoidance and resolution

- In NEC4, secondary Option X12 is renamed 'Multiparty collaboration' (formerly 'Partnering'). Option X12 is not to be used together with Option X20 (Key Performance Indicators). This Option allows for multiple two-party contractual relations between Partners. The Promoter, who could be the Client, or could be the Contractor (for example, in a partnering contract between the Contractor and a subcontractor), is a Partner. Partners are those who have a contract in connection with the subject matter of the contract that includes this Option or its equivalent (X12.1). Option X12 does not create a legal partnership between Partners who are not one of the Parties in the contract (X12.2(6)). The Core Group comprises the Partners who take decisions (X12.1(4)) and the Schedule of Core Group Members is a list of the Partners within the Core Group (X12.1(5)). Partnering Information specifies how the Partners collaborate and is included in the Contract Data. The Core Group can give instructions to change the Partnering Information and can set targets including Key Performance Indicators (X12.1(7)) and associated payments. This Option includes provisions for the Partners to be rewarded, but there are no shared penalties. The Promoter may not delete or reduce any payments stated in the Schedule of Partners (X12.4(2)).
- Alternative provisions for adjudication are set out in Options W1 and W2. Option W2 must be used when the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) applies to the contract.
- Under Option W1, the Parties to the contract and the Project Manager are to follow the set out detailed procedures. Under clause W1.1, the Parties use a consensual dispute resolution process instead of going straight to adjudication. Senior Representatives will try to negotiate a solution within the period stated under that clause. A Dispute Reference Table under clause W1.1 lists, for different types of dispute, which Party may refer the dispute to the Senior Representatives and the timing of such referral.

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NEC4 ECC

- Option W2 is a procedure which complies with the HGCRA. The Option was amended in the NEC3 edition to bring it into compliance with amendments to the HGCRA. The changes include the addition of an express term that the Adjudicator in his or her discretion is to allocate the fees and expenses of the adjudication between the Parties (W2.3(8)), and another term that the Adjudicator may, within five days of giving the decision to the Parties, correct any clerical or typographical error in the decision (W2.3(12)). The Parties may use a consensual dispute resolution process before referring the dispute to adjudication. Senior Representatives will try to negotiate a solution within the period stated under clause W2.1(3).
- The Adjudicator may be named in the Contract Data.
- The Adjudicator's decision is final and binding unless and until referred to a further 'tribunal'. Whether this is to be arbitration or legal proceedings will presumably be as stated in the Contract Data. If arbitration, the procedures to be followed appear not to be stated in the contract and would presumably be for the Parties to agree.
- Option W3 for international projects comprises a Dispute Avoidance Board option similar to the Dispute Avoidance/Adjudication Board in FIDIC contracts. This option is new to NEC4.

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NEC4 ECC

This contract?

If considering using the NEC4 ECC, the following points should be borne in mind.

The NEC4 is built around the idea of core clauses to which selected main option clauses and secondary option clauses may be added.

The 'Contract Data' and the 'Scope' are essential components of the NEC4. The former is not to be changed once the contract is entered into. The scope supplied by the client and by the contractor can be presented in a variety of formats, and is information necessary at tender stage.

There are no stated restrictions on the use of NEC4, but the law of the contract, the language of the contract and the currency of the contract should be entered in the contract data (part one). A change in the law of the country in which the site is located might be a compensation event if secondary Option X2 is incorporated.

Additionally, Option Y(UK)2 takes account of the HGCRA as amended by the Local Democracy, Economic Development and Construction Act 2009, and Option Y(UK)3 takes account of the Contracts (Rights of Third Parties) Act 1999. Option Y(UK)2 will be applicable for England and Wales, Northern Ireland and Scotland, and Y(UK)3 will be applicable only to England and Wales and Northern Ireland.

The key persons are: the 'Project Manager', who manages the procurement of the works for the client; and the 'Supervisor', who exercises certain responsibilities relating to quality assurance on site for the client, with whom the supervisor has a contract for services.

Completion of the form requires the client to select or assemble the appropriate option clauses, and to make relevant entries to 13 pages of contract data. Attestation is by a separate document.

Administration of the NEC4 ECC requires attention to communications, early warnings, changes in the scope and compensation events in particular. A co-operative and non-adversarial attitude is essential with NEC4 and there is a strong emphasis on best practice management.

An alternative to the NEC4 ECC with Option X12 would be the JCT Constructing Excellence Contract 2016 (CE16) with a Project Team Arrangement. The main difference between these two forms is that NEC4 ECC includes provisions for project partners to be rewarded, but there are no shared penalties, whereas in JCT CE16, the partners share both rewards and penalties.

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NEC4 ECC

References and further reading

NEC4: Preparing an Engineering and Construction Contract
NEC4: Managing an Engineering and Construction Contract
NEC4: Engineering and Construction Contract Flow Charts

NEC4 Practice Note 2: How to use the CIC BIM Protocol with NEC4 (2018)

Lupton, S. 'JCT Standard Forms of Building Contract, 2005–2007 editions: Part 2 – Constructing Excellence', *International Construction Law Review*, 24(4) (2007), pp. 466–83.
Forward, F. *Architect's Guide to NEC4*, London: RIBA Publishing (2018)

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NEC4 ECSC

Institution of Civil Engineers

NEC4 Engineering and Construction Short Contract (ECSC)

The NEC4 Engineering and Construction Short Contract (ECSC) is marketed as being appropriate for use on projects that do not require sophisticated management techniques, comprise straightforward work and impose only low risks on both the client and the contractor.

Background

Although the New Engineering Contract of 1993 was at first promoted as a contract that could be used across the whole spectrum of projects, the Latham Report stated the need for 'a simpler and shorter minor works document'. In response, the NEC Engineering and Construction Short Contract was published in July 1999.

Structure

The NEC4 ECSC contains the contract clauses and the form for the contract data.

The parties are the client and the contractor. There is no express provision for a project manager or a supervisor, but the client may delegate the authority for taking empowered actions. The contract requires a fair amount of involvement by the client and some provisions are particularly demanding in terms of management expertise required of the client. This is especially so in dealing with compensation events, which are almost as complex as those in the NEC4 ECC. These demands on the client would suggest that the ECSC would not suit an inexperienced client for a one-off construction project. In all likelihood, the ECSC would be used for specific work, such as enabling works, forming part of a larger project where the main NEC4 ECC is used.

Although the ECSC is a derivative of the main ECC form, it is more than simply a pared-down version. Unlike in the ECC, in the short form the important material specific to a particular contract is placed right up-front. This material comprises the following items:

- Contract data – the client's data: dates; period for reply to communications; damages; retention; interest on late payments; limit of contractor's liability; insurance obligations; whether or not the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) applies, name of adjudicator or the adjudicator nominating body, tribunal and arbitration procedures (if relevant). Additional conditions may be incorporated and, if so, are to be listed.
- Contract data – the contractor's data: contractor's fee percentage; categories of persons employed and rates; equipment and percentage for adjustment for equipment.

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- Contractor's offer and client's acceptance: signed and dated. The offer and acceptance are, of course, required to form the contract.
- Price list: a schedule of the quantities, rates and prices of items to be completed according to whether this is a lump sum or a remeasurement contract.
- Scope: description of the works which the contractor is to carry out and any work which the contractor is to design; list of drawings; list of specifications applicable; constraints on the contractor, such as sequence, timing, methods and conduct of work; requirements for a programme, such as form, content, submission and updating; and services to be provided by the client.
- Site information: ground conditions, access, position of adjacent structures, etc.

The conditions of contract, which occupy only 17 pages, are set out in a similar but not identical way to the core clauses in the NEC4 ECC and are briefer.

The contract has been amended to include additional conditions where the HGCRA as amended by the Local Democracy, Economic Development and Construction Act 2009 applies.

Use

The NEC4 ECSC could be used as a design-bid-build ('traditional') contract or design-bid-build with contractor's design contract.

Synopsis

1 Roles

- The Parties are the Client and the Contractor (in pre-NEC4 forms the Client was referred to as the Employer).
- There is no express provision for a Project Manager or a Supervisor, but the Client may delegate the authority for taking empowered actions (14.5).
- The Parties act in a contractual spirit of mutual trust and co-operation (10.2).
- Early warning is a significant requirement in the contract (15).
- The Client must allow the Contractor access to and use of the Site (note: this does not necessarily mean possession) and provide the services stated in the Scope (16).
- Use of the NEC4 Engineering and Construction Short Subcontract would seem to be necessary for any subcontracted work.

2 Documents

- Scope is defined under clause 11.2(16). The Scope describes the work required and lists the contract drawings and specifications, any constraints on how the Contractor will provide the work, requirements for the programme, what services or Plant and Materials will be provided by the Client and the Site Information.

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- The terms used in the contract are defined under clause 11.
- Communications are to be in a form that can be read, copied and recorded and sent to the last notified address and the response should be within the period for reply (13).
- Site Information is defined under clause 11.2(17) and information about the Site is set out under the section Site Information.
- The contract is governed by the law of the country where the Site is located (12.2).
- Third party rights, under the Contracts (Rights of Third Parties) Act 1999, are neither included nor excluded.

3 Control: time

- Starting date and completion date are entered in the Contract Data. The Contractor may not start before the starting date and Completion may be on or before the completion date (30.1).
- The Contractor must submit a forecast of the date for completion to the Client each week (30.2).
- The Client may instruct the Contractor to stop or restart work (30.4).
- The Contractor must submit a programme as required in the Scope (31).
- Where delay occurs due to certain intervening events, these may constitute 'compensation events' (60). There are 12 listed, mostly arising from action or inaction by the Client, but also including some neutral causes, such as weather (measured in ratio of days lost against contract period) and physical conditions beyond those which could reasonably have been expected or an event which delays Completion by more than two weeks and which could not normally be expected to occur. This would presumably not allow for strikes or lock-outs.
- The procedures for notifying compensation events, quotations for changes to prices or rates and the mechanism for assessing the events are almost as full for this short contract as those in the major form (62 and 63).

4 Control: quality

- The Client may give instructions that change the Scope (14.2).
- The Contractor must obey empowered instructions issued by the Client (14.1).
- The early warning obligation can constitute a control mechanism (15).
- The Contractor cannot start on work that it has designed before the Client has accepted that the design complies with the Scope (20.2).
- The Client may delegate any actions and may cancel any delegation (14.5).

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NEC4 ECSC

- The Client may instruct the removal of a person (21.3).
- The Contractor must provide access for the Client and others to work and to stored Plant and Materials (22).
- Consent is not required for subcontracting, but the Contractor remains wholly responsible (21.1).
- The NEC4 form now includes a provision for carrying out tests and inspections as required by the Scope (40.1).
- The Client may instruct the Contractor to search for Defects (41.1). Whether or not the Client notifies the Contractor of a Defect, the Contractor is obliged to correct them (42.1).
- After Completion the Contractor is to correct notified Defects before the end of the defect correction period (stated in weeks in the Contract Data) (42.3), and the Client is to issue a Defects Certificate (42.4).
- The defect correction period begins at Completion or, following Completion, from when a Defect is notified.
- Uncorrected Defects permit the Client to engage others to carry out remedial work, the cost of which can be charged to the Contractor (44).

5 Control: cost

- Provisions for payments, including assessment day and date for payment, assessing the amount due for payment, etc, are included under section 5: Payment. The Contractor is to make application for payment by the assessment date (the date stated in the Contract Data) once a month (50.1). The final date for payment of the notified sum is three weeks after the payment due date (51.1). Interest becomes payable on late payments (51.2). Retention is held according to the percentage stated in the Contract Data; half is released on Completion and the remainder after the Defects Certificate is issued (50.7).

  The following comments under this section relate to projects that are in the UK where the HGCRA applies.

- The Contractor's application for payment is the notice of payment. The application specifies the sum the Contractor considers to be due at the payment due date (the notified sum) and states the basis on which the amount has been calculated (1.2).
- If either Party intends to pay less than the notified sum, it is to inform the other Party of the amount it considers due on the date of the notice and the basis for the calculation no later than seven days before the final date for payment. A Party is to pay the notified sum unless it has served a valid 'pay less notice' (1.4).
- If the Contractor exercises its right to suspend performance on account of non-payment of sums due, this will be deemed a compensation event (1.5).

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NEC4 ECSC

6 Insurance

- The Client may provide insurance where this is stated in the Contract Data, and where this occurs it is not provided by the Contractor (83.1).
- The Contractor is to provide the insurances stated in the Insurance Table (83.3).
- All but the fourth insurance in the table (death of or bodily injury to employees of the Contractor) are in joint names.
- The insurance is for replacement cost in respect of loss or damage to Plant and Materials or the works, and extends from the starting date to the Certificate of Completion in the case of Plant and Materials, and the Defects Certificate in the case of the works.
- Insurance may also be required in respect of the Contractor's liability for damage to property other than the works, and injury or death to persons for the minimum cover as stated in the Contract Data.
- The Contractor's liabilities are: for claims and proceedings from others and compensation and costs payable to others in connection with the works; for replacement in the event of loss of plant or materials, and damage to the works; damage to the Client's property other than the works; and death and injury to the Contractor's employees (81).
- The Contractor's liability for loss or damage to the Client's property is limited to the amount stated in the Contract Data.
- There are no express obligations relating to statute or regulations, but these would be implied. In the event of a breach of statutory duty by the Client, the Contractor is indemnified against claims or proceedings and costs arising (81.1).

7 Termination

- Both the Client and the Contractor have the right to terminate the Contractor's obligation to Provide the Works.
- There are nine reasons stated which allow for termination, including insolvency of the other Party (reason 1) (90.2). The Client may also terminate 'for any other reason' (reason 9) (90.7).
- There is no express reference to the CDM Regulations, other than providing a reason for termination by the Client if the Contractor substantially breaks a health or safety regulation (reason 4) (90.3).
- The Client must issue a notification to terminate, after which the Contractor must cease work (90.1).
- On termination, the Contractor must leave the Site and remove any Equipment and the Client may complete the works (91.1).

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NEC4 ECSC

- Amounts due on termination are as stated, according to the reasons which apply (92).

8 Dispute avoidance and resolution

- Settlement of disputes is to be by reference to adjudication and the details and procedure set out under clause 93.
- The Adjudicator may be named in the Contract Data.
- The Adjudicator's decision is final and binding unless and until referred to a further 'tribunal' (93.4). The Contract Data should state whether arbitration is the tribunal and, if so, what the arbitration procedure is to be.
- Clause 93.3(1) on adjudication is replaced by clauses 1.6 to 1.9 of the Additional Conditions for use in the UK, where the HGCRA applies.
- A Party may issue to the other Party a notice of intention to refer a dispute to adjudication at any time and is to refer such dispute to an Adjudicator within seven days of the notice (1.6).
- The Adjudicator may allocate the costs of the Adjudicator's fees between the Parties (1.7).
- The Adjudicator may, within five working days of giving the decision to the Parties, correct any clerical or typographical errors in the decision (1.8).
- Where the Adjudicator's decision changes an amount notified as due, payment of the sum due will be made no later than seven days from the decision or the final date for payment, whichever is later (1.9).

This contract?

If considering using the NEC4 ECSC, the following points should be borne in mind.

It is intended for use as a lump sum or remeasurement contract for minor building and engineering works. Care is needed at the outset to establish that the conditions, which are short but generally commensurate with work of this nature, will be adequate for the intended works. The agreement is based on the offer and acceptance near the front of the contract form. Contract data and Scope are particularly important and require full entries and careful checking by both parties.

The law of the contract is that applying to the country where the site is located. There is no express reference to the law of Northern Ireland or to Scots law. Consequential amendments necessary to the conditions to make them suitable for different jurisdictions would be included in the contract data.

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NEC4 ECSC

References and further reading

NEC4 Engineering and Construction Short Contract (ECSC)
NEC4 Engineering and Construction Contract (ECC)
NEC4: Preparing an Engineering and Construction Short Contract
NEC4: Managing an Engineering and Construction Short Contract
NEC4: Engineering and Construction Short Contract Flow Charts

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NEC4 ALC

Institution of Civil Engineers

NEC4 Alliance Contract (ALC)

The NEC4 Alliance Contract (ALC) is new to the NEC4 suite of contracts. Prior to its publication, a client wishing to use an NEC contract for an integrated team would have to enter into multiple two-party arrangements by using the NEC ECC with secondary Option X12.

Background

Following the publication of a consultative version in July 2017, the final form of the NEC4 ALC was published in June 2018.

Structure

The client and its partners, such as consultants, key contractors and suppliers, enter into an 'Alliance'. The contract permits a degree of flexibility over the number of partners and their contractual relationship with the client.

The main decision-making body is the alliance board, which comprises representatives from the client and each partner. The alliance board appoints an alliance manager.

The alliance manager manages the work of the alliance and takes on a role broadly similar to that of the project manager under the NEC4 ECC. Alliance members undertake to deliver the project in accordance with the implementation plan on a 'best for project' basis.

The contract comprises: the core clauses, option clauses (X options, Y options and Option Z), a schedule of cost components and the contract data.

Use

The NEC4 ALC is intended for use by a client wishing to enter into a multi-party contract for a single major project or a programme of works. The overarching principle is that the members of the alliance work collectively to deliver the contract on a best for project basis.

Synopsis

1 Roles

- The Alliance is the Client and the Partners (11.2(1)).
- The Alliance Board comprises representatives from the Client and each Partner.
- The Alliance Board appoints an Alliance Manager.
- The Alliance and the Alliance Manager shall act in a spirit of mutual trust and co-operation (10.2).

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- There are clear rules relating to communications (eg certificates, submissions, periods for reply, etc) (13).
- A member of the Alliance is obliged not to do a Corrupt Act (17) (the definition of a Corrupt Act is under clause 11.2(12)).
- The Alliance's main responsibilities are set out under section 2 of the core clauses.
- The members of the Alliance collaborate with each other to: achieve the Alliance Objectives, which are included in the Contract Data: part one, and the partner objectives of every Partner, which are included in the Contract Data: part two; develop and use common systems and processes, as set out in the Implementation Plan included in the Contract Data: part one; give advice, information and opinion fully, openly and objectively to the Alliance Board and other members of the Alliance as and when required to do so; establish an integrated alliance delivery team based on a best for project basis and, on the same basis, work collectively on the delivery of the contract (20.1).
- The Alliance Provides the Works in accordance with the Scope, the Alliance Objectives and the Implementation Plan (20.2).
- The obligations of the Alliance Board are noted under clause 21, including requirements for meetings, communications, allocation of work, etc.
- The tasks required of the Alliance Manager are noted under clause 22. These include acting in accordance with the Implementation Plan and complying with instructions, maintaining a record of changes to the Scope, report preparation, and cost and time forecasting.
- Early warning is a significant requirement in the contract (15). The Alliance sets up the first Early Warning Register and issues it to the Alliance within one week of the starting date, and the first early warning meeting is held within two weeks of that date. Early warning meetings are held at the intervals set out in the Contract Data: part one. Decisions made at the meetings, including changes to the Scope, are recorded by the Alliance Manger, who revises the Early Warning Register.

2 Documents

- The contract comprises the core clauses, Option X clauses, Option Y clauses, additional Option Z clauses, a Schedule of Cost Components and the Contract Data.
- The numbering of the core clauses more or less follows that used in core clauses of the NEC4 ECC.
- There are a limited number of Option X clauses (a number of the NEC4 ECC secondary Option clauses are incorporated into the core clause of the ALC; eg those dealing with disputes are included under clauses 95, 96 and 97). The available X Option clauses, which may be selected as required and in any combination, make provision for: changes in the law (X2); performance guarantee (X4); transfer of rights (X9);

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NEC4 ALC

information modelling (X10); limitation of liability (X18); early Alliance involvement (X22); and programme of work (X26).

- The Option Y clauses deal with national legislation and need to be included depending on the jurisdiction. The Option Y clauses comprise: Y(UK)1 Project Bank Account; Y(UK)2 The Housing Grants, Construction and Regeneration Act 1996; and Y(UK)3 The Contracts (Rights of Third Parties) Act 1999.
- Any additional conditions of contract that are required are entered under Option Z.
- The Contract Data comprises two parts: part one: Client and Alliance data and part two: Partner data.

3 Control: time

- The Client may instruct the Alliance to stop, start or re-start any work (35).
- The Client allows necessary access to the Site to the Alliance on or before its access date as shown on the Issued Programme (34).
- If a programme is not identified in the Contract Data, the Alliance Manager prepares the first programme. The Alliance Partners are to provide information for use in the production and updating of the programme as required by the Alliance Manager. Each programme is to be in the form stated in the Scope and must include the following: the starting date, access dates and the Completion Date (all of which are included in the Contract Data: part one), how the work is to be carried out to meet the Alliance and partner objectives, the order and timing of operations by the Alliance and Others in order to Provide the Works, dates by which the Alliance is to complete other work needed to allow Others to do their work, provisions for float, time risk allowances, health and safety requirements and contract procedures, dates needed by the Alliance for access to part of the Site, acceptances and information from Others, method statements by the Alliance for each operation, identifying the principal Equipment (listed under Contract Data: part two) and other resources that would be used, and other information which the Scope requires the Alliance to show on a programme (32).
- Revisions or changes to the Implementation Plan may be proposed by either the Alliance Manager or by a member of the Alliance. The Alliance Manager consults with the Alliance and submits the proposed change to the Alliance Board for acceptance. The Alliance Board either notifies acceptance of the change and instructs a change to the Implementation Plan, or does not accept (giving reasons), in which case the Alliance Manager either submits a revised proposal or agrees with the Alliance that no change is required (31). Clause 33 sets out what is to be shown on each revised programme (33).
- The Alliance Manager decides the date of Completion and certifies it within one week of the date (30.2).

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- The Client takes over the works not later than two weeks after Completion. With the agreement of the Alliance Board, the Client may use any part of the works before Completion is certified. Within one week of the Client's taking over of any part of the works, the Alliance Manager certifies the take-over (36).

4 Control: quality

- Each member of the Alliance needs to have in place a quality management system compliant with the Scope requirements. A quality plan is produced by the Alliance Manager, with the support of the Alliance members, and is issued to the Alliance, who must comply (40).
- The Client and the Alliance Manager inform each other of any tests and inspections they will carry out and issue results afterwards. The Client may watch any tests done by the Alliance. Defects are corrected by the Alliance and the test or inspection is repeated (41).
- The Alliance Manger may, until the defects date, instruct the Alliance to search for a Defect, giving reasons for the search. The Alliance Manager and the Alliance inform each other when either becomes aware of a Defect (42).
- Defects are corrected by the Alliance whether or not the Alliance Manager has notified. When a Defect is required to be corrected, the Alliance does so before the end of the defect correction period. The defect correction period begins at Completion or, following Completion, from when a Defect is notified. If there are no notified Defects at the Defects Date, or when all notified Defects have been corrected, the Alliance Manager issues a Defects Certificate to the Alliance Board. The Alliance Board may accept the Defects Certificate; if it does not accept the certificate, the Alliance Manger submits a revised certificate when all notified Defects have been corrected. The issue of the Defects Certificate does not affect the Client's rights in respect of any unnotified Defects or Defects that have not been found. The Client allows the Alliance access to the works to correct Defects (43).
- The Alliance Board may instruct the Alliance Manger to change the Scope (along with the Performance Table, Budget and Completion Date) so that a Defect does not have to be corrected. Such a change is not a compensation event (44).
- If a Defect is a failure to achieve an Alliance Objective, the Alliance does not correct the Defect (43.1).
- The Alliance carries out the design necessary to Provide the Works (23.1).
- Clause 23 sets out the procedure for design submission and acceptance and deals with copyright in the design. The period for retention of drawings, specifications and other design documents is as set out in the Contract Data: part one.
- A member of the Alliance that intends to subcontract work must submit to the Alliance Manager details of the work, details of the proposed subcontractor and

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NEC4 ALC

the subcontract documents, including pricing information. The members of the Alliance remain responsible for that work (26).

5 Control: cost

- The Alliance Cost is the sum of the Price for Work Done to Date and the Client's Costs (11.2(3)).
- The Defined Cost is the cost of components in the Schedule of Cost Components, as included in the Contract Data: part two, less any cost that is not justified by a Partner's accounts and records (Disallowed Cost) (11.2(15 and 16) and 52).
- The Fee is calculated by applying a Partner's fee percentage, included in the Contract Data: part two, to the Partner's Defined Cost (11.2(19)).
- The Price for Work Done to Date is the total Defined Cost that the Alliance Manager forecasts will have been paid by the Partners before the next assessment date plus the Fee (11.2(27)).
- Before each assessment date the Alliance Manager, in consultation with the Partners, assesses the amount due and submits an application for payment to the Client (50). The assessment interval is included in the Contract Data: part one.
- The amount due is the total of the Price for Work Done to Date, plus other amounts to be paid to the Partners, minus retention or amounts to be paid by the Partners.
- The application for payment includes the amount due to each Partner, and details of assessment. Payment is made within three weeks of each assessment date. Interest is payable on late payments (51).
- Clause 53 describes the performance measures. The Alliance Manager assess the Alliance's performance in accordance with the Performance Table, which is included in the Contract Data: part one. If a target for an Alliance Objective is met or is exceeded, the Partners are paid the amount stated in the Performance Table. If the target is not met then the Partners pay the amount stated in the Performance Table.
- The Alliance Manager makes a final assessment of the amount due to each Partner no later than four weeks from the acceptance by the Alliance Board of the Defects Certificate or thirteen weeks after the issue of a termination certificate. Details of the assessment are given to the Alliance Board and an application for payment is submitted to the Client. The final payment is made within three weeks of the assessment. The final assessment is conclusive evidence of the final amount due unless a dispute is referred to the Alliance Board for final resolution within four weeks of the date of assessment (54).
- Where the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) (Option Y(UK)2) applies and the Client or a Partner intends to pay less than the notified amount, it notifies the other and the Alliance Manager not later than seven days before the final date for payment.

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NEC4 ALC

6 Insurance

- The standard liabilities to be carried by the Client are described and any additional liabilities to be carried by the Client may be entered in the Contract Data (80).
- The standard liabilities to be carried by the Partners are described and any additional liabilities to be carried by the Partners may be entered in the Contract Data (81).
- Liabilities not stated as being the Client's or the Partners' are an Alliance Cost unless recovered from an insurer (82).
- Each party (Client and Partners) indemnifies the others in respect of costs arising from an event for which that party is liable (83).
- Insurance responsibilities are stated in the Insurance Table in clause 84 and additional insurances are stated in the Contract Data.
- Where the Client insures, policies and certificates must be submitted to the Alliance Manager for acceptance. Such acceptance does not change the Client's responsibility to provide insurances stated in the Contract Data. If the Client fails to submit, then a Partner may insure and charge to the Client (85).
- The Partners submit to the Alliance Manager for acceptance, valid and up-to-date certificates signed by the Partners' insurer or insurance broker. The Alliance Manager accepts the certificate if the insurance complies with the contract (86).
- Compensation events are afforded a complete section in the core clauses (section 6). The NEC4 ALC lists substantially fewer compensation events (60) than are included in the NEC4 ECC, although additional compensation events may be included in the Contract Data. The following compensation events are included under clause 60: an instruction by the Client or the Alliance Board that changes the Client's Requirements; the Client instructs stoppage or does not allow access to the Site by the access date or by the date shown on the Issued Programme; an instruction by the Alliance Board changing the Scope so as to avoid or reduce the effect of a compensation event; a notified correction by the Alliance Manager; an event that stops the Alliance completing the whole of the works, or completing the whole of the works by the date for Completion, and which the Alliance could not prevent or which, at the Contract Date, would have been judged unreasonable to allow. Clauses 61 to 64 set out the process for notifying, costing, assessing and implementing compensation events. When a compensation event is implemented, the Budget, the Completion Date and the Performance Table are changed accordingly.
- Where the HGCRA (Option Y(UK)2) applies, a Partner exercising its right to suspend performance would be a compensation event (Y2.5).

7 Termination

- If the Alliance Board wishes to terminate the obligation of one or all of the Partners to participate in Providing the Works, it notifies the Partner or Partners and/or other

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NEC4 ALC

Partners, the Alliance Manger and the Client, giving details of the reason. If the reason complies with the contract, the Alliance Manager issues a termination certificate (90). Reasons are identified in the Termination Table under clause 90.3. After the issue of a termination certificate, a Partner whose obligation has been terminated is no longer a member of the Alliance and does no further work (90).

- The Alliance Board may terminate the obligation of a Partner to participate in Providing the Works if all of the other Partners agree and if the reason is one of those listed under clause 91.1.
- The Alliance Board may terminate the obligation of all of the Partners to participate in Providing the Works if all of the members of the Alliance agree, other than the Client, if the reason is one of those listed under clause 91.2.
- The Alliance Board may terminate the obligation of all of the members to participate in Providing the Works if the reason is one of those listed under clause 91.3.
- Clause 92 sets out the alternatives ways of completing the works. One or more of the following may be used, as stated in the Termination Table: the Alliance complete the works (P1); the Client completes the works and, if a Partner is providing the Alliance Manager, the Client appoints a replacement Alliance Manager and notifies the Partners of the name of the replacement (P2); the Alliance Board instructs the Partner whose obligation is terminated to leave the Site and to assign the benefit of any subcontract or project-related contract to another member of the Alliance (P3); the Alliance may use Equipment of the Partner whose obligation is terminated to complete the works and the Partner removes such Equipment when it is no longer required (P4); the Partners leave the Working Areas and remove Equipment (P5); and, if necessary, the Alliance Board appoints a replacement Partner (P6).
- Clause 93 sets out what should be included in the amount due on termination.

8 Dispute avoidance and resolution

- The NEC4 ALC includes a no claims clause (94). Any failure by a member of the Alliance to comply with its obligations under the contract does not give rise to an enforceable right or legal obligation except for an event that is a Client's or Partners' liability.
- Dispute avoidance and resolution is dealt with under clause 95. A dispute between members of the Alliance, or past members, is referred to the Alliance Board. The Alliance Board may refer the dispute to either an independent expert for an opinion or to the Senior Representatives of each member of the Alliance. There are no adjudication rules in the NEC4 ALC. However, if the HGCRA applies then the statutory right to adjudication remains unaffected: a member of the Alliance may refer the dispute to adjudication whether or not the dispute has been referred to the Alliance Board (Y2.6).

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NEC4 ALC

This contract?

If considering using the NEC4 ALC, the following points should be borne in mind.

The ALC is intended for use by experienced clients who wish to form a multi-party alliance and, together with the alliance partners, work collectively to deliver a contract on a 'best for project' basis.

Alternative multi-party standard form contracts would be: for single projects, the JCT Constructing Excellence Contract 2016 (CE16) with a Project Team Agreement and the ACA Standard Form of Contract for Project Partnering, amended 2013 (PPC2000); and for multi-projects, the ACA Framework Alliance Contract (FAC-1).

References and further reading

NEC4 Alliance Contract
NEC4: Preparing an Alliance Contract
NEC4: Managing an Alliance Contract
NEC4: Alliance Contract Flow Charts

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NEC4 DBO

Institution of Civil Engineers

NEC4 Design Build and Operate Contract (DBO)

The NEC4 Design Build and Operate Contract (DBO), published in 2017, is a new addition to the NEC family of contracts. It allows clients to procure a more integrated whole-life delivery solution. It combines the responsibilities for design, construction, operation and/or maintenance, which can be procured from a single supplier.

Background

The DBO variant is a development of the management contracting approach. It offers clients a way to procure a total integrated service from a single source. The service provision can be led by a contractor or by some other professional, although the latter is only likely to occur if the design aspects of the project are a high priority.

Up until the publication of the NEC4 DBO, the FIDIC Gold Book was the only standard form that provided for this variant. In practice, though, developers and contracting organisations have mostly used specially drafted forms.

Structure

To a degree, the NEC4 DBO follows the structure of the NEC4 ECC contract.

The core clauses are set out in nine sections; these apply in all contracts. With the exception of section 7, the sections mirror those of the NEC4 ECC.

There are nine X option clauses, eight of which also mirror the equivalent secondary option clauses of the NEC4 ECC. Option X23 (extending the service period) is specific to DBO.

There are two Y option clauses, which deal with national legislation (Y(UK)2 and Y(UK)3) and two W options, for resolving and avoiding disputes. Option Z is also included, which allows for additional conditions of contract to be inserted.

For UK projects, where the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) and the Contracts (Rights of Third Parties) Act 1999 apply, Options Y(UK)2 or Y(UK)3 and Option W2 need to be selected.

Use

The NEC4 DBO contract aims to meet the increasing demand for contracts that extend into the operational phase.

Synopsis

1 Roles

- The Parties to the contract are the Client and the Contractor.

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NEC4 DBO

- Client – the Party entering into contract with the Contractor.
- Contractor – the Party entering into contract with the Client.
- A Service Manager is appointed by the Client and acts in ways similar to the Project Manager in the NEC4 ECC.
- The contractual spirit of mutual trust and co-operation is expressed in the 'General' section of the core clauses (10.2).
- The intentions of the Parties as indicated in the Contract Documents should be evident from the core clauses, the choice of Option clauses and the Contract Data provided by the Client.
- The Contractor Provides the Service in accordance with the Scope (20.1).
- Communications are to be in a form that can be read, copied and recorded and sent to the last notified address and the period for reply as stated in the Contract Data provided by the Client (13).
- There is a definition of the Affected Property under clause 11.2(2).
- Early warning is a significant requirement in the contract (15).
- An Early Warning Register is set up at the start of the project and included in the Contract Data. The Early Warning Register may be added to during the course of the project, and the Contractor or Service Manager may require an early warning meeting to discuss the noted risks (15).
- Instructions are required from the Service Manager to resolve any ambiguities or inconsistencies (17).
- The Contractor is obliged not to do a Corrupt Act and to stop subcontractors or suppliers from doing so (18).
- The Contractor's main obligation is to Provide the Service in accordance with the Scope (20), which is defined in clause 11.2(22). It is important therefore to make certain that this information is full, clear and accurate.
- The contract allows for design by the Contractor (21) and deals with copyright in that design (22).
- The Contractor is responsible for co-operation over providing information, and the sharing of Working Areas is a contractual obligation (24).
- The Contractor must act in accordance with the health and safety requirements stated in the Scope (26.4).
- Title to plant, equipment and materials that is vested in the Contractor passes to the Client if any such items are brought within the Affected Property or, if they are outside the Service Areas, the Service Manager marks them as being 'for the contract'. The title reverts to the Contractor if those items are removed from the

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NEC4 DBO

Affected Property with the Service Manager's permission (70). The subject of title is allocated a complete section of the core clauses (section 7).

- Restrictions on the disclosure of confidential information in connection with the service are set out in clause 28.
- Under clause 27, either Party notifies the other of its intent to assign the benefits of, or its rights under, the contract to another party; and under clause 92.2 P2, the Client may instruct the Contractor to assign to it the benefit of contracts on termination of the Contractor's employment.

2 Documents

- Scope is defined under clause 11.2(22). The Scope describes the service and states any constraints on how the Contractor will Provide the Service. This will either be in the documents listed in the Contract Data or in instructions issued during the project.
- Option X10 deals with issues related to the Information Model, ownership of information and liability of the Parties. NEC4 Practice Note 2: *How to use the CIC BIM Protocol with NEC4* (April 2018) sets out how the CIC Protocol can be incorporated into the NEC4 DBO by the selection of secondary Option X10 and the inclusion of the Protocol as the Information Model Requirements in the Scope.
- Secondary Option X8 requires the Contractor to give undertakings (as opposed to collateral warranties) to Others, as stated in the Contract Data. There is also provision for subcontractors to provide undertakings to the Client and to Others should they be carrying out any of the work stated in the Contract Data as requiring undertakings. The undertakings are to be in the form set out in the Scope.
- Option Y(UK)3 provides the option to contract out of third party rights under the Contracts (Rights of Third Parties) Act 1999. It should be incorporated into the Contract Data for all contracts to which the law of England and Wales or Northern Ireland applies.

3 Control: time

- The Contractor's Plan is critical as it shows, among other things, the starting and end dates of the Service Period, the planned starting date for the works and Works Completion, the order and timing of the work of the Client and Others, provisions for float, time risks allowances and health and safety requirements (31).
- Revising the Contractor's Plan is under clause 32.
- Access to and use of the Affected Property are under clause 33.
- Obligations and requirements in relation to starting work, Works Completion and the end of the Service Period are set out under clause 30. The Contractor does not start work until the starting date. The Service Manager decides the date of Works

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NEC4 DBO

Completion and certifies it within one week of the date. At the end of the Service Period the Affected Property reverts to the Client in the condition stated in the Scope.

- The Contractor's Plan should be identified in the Contract Data, or otherwise submitted to the Service Manager by the Contractor. If the Contractor fails to produce a Contractor's Plan, 25 per cent of any amount that would otherwise be due to the Contractor is retained until the Contractor complies (50.5). The detail of information to be included in the Contractor's Plan is described under clause 31. The Contractor's Plan may be revised subject to conditions (32).
- The Service Manager is empowered to issue instructions to stop or not start any work or to remove work from the Scope (34).
- Where delay occurs due to certain intervening events, these may constitute 'compensation events' (60). Nineteen compensation events are listed with precise requirements and additional compensation events can be included in the Contract Data. The Contractor is obliged to notify the Service Manager of such events, and the Service Manager will decide whether compensation is due (61). The 'early warning' requirement will be taken into account. Compensation events are afforded a complete section in the core clauses (section 6).
- The Service Manager may instruct the Contractor to submit a quotation to deal with the monetary losses associated with a delay. The quotation should include the effect on the Accepted Plan (62).
- Assessment of compensation events is a matter for the Service Manager in accordance with certain rules and procedures (63 and 64). The Service Manager must notify the Contractor of its decision.

4 Control: quality

- The early warning obligation can constitute a control mechanism (15).
- The Service Manager is given considerable powers and may delegate. The Service Manager is empowered to issue instructions to the Contractor relating to changes to the Scope or the Affected Property (14).
- The Contractor must submit names, qualifications and experience of key people. Replacements are subject to acceptance by the Service Manager (23).
- The Service Manager may order the removal of a person from any further connection with the particular work included in the contract (23.2).
- The Contractor must arrange for access to work being done and to materials and plant in store for the Service Manager and others named by the Service Manager (26.2).
- The Contractor must obey instructions, that are in accordance with the contract, from the Service Manager (26.3).

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NEC4 DBO

- The Contractor is wholly responsible for the work of all subcontractors. All subcontractors are subject to acceptance by the Service Manager (25).
- Tests and inspections required by the Scope or the applicable law must be carried out by the Contractor and may be observed by the Service Manager. The Service Manager may also order the Contractor to carry out tests and may carry out its own tests (41).
- Until the end of the Service Period, the Service Manager and the Contractor notify each other of any Defect. Whether or not the Service Manager notifies, the Contractor is obliged to correct Defects within a time that minimises their negative impacts on the Client or Others. The Service Manager is to arrange access for the Contractor to correct Defects. Where it is agreed that Defects need not be corrected, there may be changes to the Scope and a cost reduction (43).
- The contract makes no reference to assignment, other than the Contractor's obligation to assign the benefit of any contracts on termination of its employment (96).

5 Control: cost

- The Contractor may propose a change to the Scope in order to reduce the whole life cost of operating and maintaining the Affected Property (16).
- The Service Manager must assess the amounts due to the Contractor at each assessment date. The intervals are included in the Contract Data (50).
- The Service Manager certifies a payment within one week of each assessment date, and each certified payment is made within three weeks of the assessment date, or within a different period if one is stated in the Contract Data. Interest is payable on amounts due but unpaid, and in respect of a Service Manager's certificate which is due but issued late. The interest rate is to be stated in the Contract Data (51).
- Each amount due includes an amount for price adjustment as set out in clause 54.
- Option Y(UK)2 (Housing Grants, Construction and Regeneration Act 1996) would apply to all contracts on NEC4 in the UK. It includes provisions for the use of 'pay less notices'.
- The Service Manager's certificate is the notice of payment to the Contractor and sets out the amount due on the relevant payment due date (the notified sum) and the basis on which the amount was calculated (Y2.2).
- The date on which payment becomes due is seven days after the assessment date, and the final payment due date is in accordance with the provisions set out in Y2.2. The final date for payment is the later of, either, 14 days after the payment due date or a different period if one is stated in the Contract Data, or seven days after receipt of an invoice (Y2.2).

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NEC4 DBO

- If either Party intends to pay less than the notified sum, that Party will issue a pay less notice not later than seven days (the prescribed period) before the final payment date, stating the amount it considers due and the basis for its calculation. No amount can be withheld under the contract unless a Party has issued a pay less notice (Y2.3).
- Suspension of performance by the Contractor in the event of the Client's failure to make proper payment is treated as a compensation event (Y2.5).
- The Price List and the Performance Table are not part of the Scope. Any changes proposed by the Contractor require the acceptance of the Service Manager (55).
- The Service Manager makes an assessment of the final amount due and certifies final payment not later than fourteen weeks after the end of the Service Period or a different period as stated in the Contract Data, or fourteen weeks after the Service Manager issues a termination certificate, or, if the Service Manager does not make an assessment after the end of the Service Period, then one week after the Contractor issues its assessment (Y2.2).

6 Insurance

- The standard liabilities ('risks' in NEC3) to be carried by the Client are itemised, and any additional liabilities to be carried by the Client may be entered in the Contract Data (80).
- Liabilities not itemised as being carried by the Client are to be carried by the Contractor (81).
- Insurance responsibilities are as tabled in clause 83 and additional insurances as stated in the Contract Data.
- The Contractor is to provide the insurances stated in the Insurance Table (83.3).
- All but the second insurance in the table (professional indemnity) and fifth insurance (death of or bodily injury to employees of the Contractor) are in joint names.
- If the Contractor fails to insure as required by the contract, then the Client may insure and charge to the Contractor (85).
- Where the Client insures, policies and certificates must be submitted to the Contractor. If the Client fails to submit, then the Contractor may insure and charge to the Client (86).
- Details of insurance obligations and cover are to be stated in the Contract Data.

7 Termination

- Either Party wishing to terminate the Contractor's employment notifies the Service Manager and the other Party, giving reasons. If the reasons comply with the conditions of contract, the Service Manager issues a Termination Certificate (90).

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NEC4 DBO

- Valid reasons for termination by the Client and by the Contractor are set out in a Termination Table (90.2).
- Following the issue of the Termination Certificate, termination procedures are implemented as set out in the Termination Table. Payments which may be due on termination are as set out in the Termination Table.
- The Client may elect to complete the works itself or to employ another Contractor, and may use any plant or materials to which it has title (92.1).

8 Dispute avoidance and resolution

- Alternative provisions for adjudication are set out in Options W1 and W2. Option W2 must be used when the HGCRA applies to the contract.
- Under Option W1, the Parties to the contract and the Service Manager are to follow the set out detailed procedures. Under clause W1.1, the Parties use a consensual dispute resolution process instead of going straight to adjudication. Senior Representatives will try to negotiate a solution within the period stated under that clause. A Dispute Reference Table under clause W1.1 lists, for different types of dispute, the party which may refer the dispute to the Senior Representatives and the timing of such referral.
- Option W2 is a procedure which complies with the HGCRA. There is an express term that the Adjudicator in his or her discretion is to allocate the fees and expenses of the adjudication between the Parties (W2.3(8)), and another term that the Adjudicator may, within five days of giving the decision to the Parties, correct any clerical or typographical error in the decision (W2.3(12)). The Parties may use a consensual dispute resolution process before referring the dispute to adjudication. Senior Representatives will try to negotiate a solution within the period stated under clause W2.1(3).
- The Adjudicator may be named in the Contract Data.
- The Adjudicator's decision is final and binding unless and until referred to a further 'tribunal'. Whether this is to be arbitration or legal proceedings will presumably be as stated in the Contract Data. If arbitration, the procedures to be followed appear not to be stated in the contract and would presumably be for the Parties to agree.

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NEC4 DBO

This contract?

If considering using the NEC4 DBO contract, the following points should be borne in mind.

Client bodies, developers or contracting organisations that choose to procure a project using the design-build-operate method mostly use bespoke contracts. The new NEC4 DBO joins the FIDIC Gold Book in offering a standard form of contract for this method of procurement.

References and further reading

NEC4 Design Build and Operate Contract
NEC4 Engineering and Construction Contract
NEC4: Preparing a Design, Build and Operate Contract
NEC4: Managing a Design, Build and Operate Contract

NEC4 Practice Note 2: How to use the CIC BIM Protocol with NEC4 (2018)

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NEC4 FC

Institution of Civil Engineers

NEC4 Framework Contract (FC)

The NEC4 Framework Contract (FC) is intended for use by a client wishing to appoint one or more suppliers of a service, each being appointed on a two-party basis, to carry out construction work or to provide design or advisory services on an 'as instructed' basis over a set term, on one or more projects.

The contract sets out the tasks that the supplier may be asked to undertake and the mechanisms by which those tasks may be required and carried out.

Background

The main change in the NEC4 FC is the inclusion of the Client's Representative, who issues instructions, Time Charge Orders and Work Orders, provides additional Contract Data, assesses quotations and replies to submissions.

Structure

The NEC4 FC comprises the conditions of contract and the contract data. The contract data consists of part one: data provided by the client and part two: data provided by the supplier.

Use

The NEC4 FC is a binding contract by which a client and a supplier agree to work together in a spirit of mutual trust and co-operation. The contract sets up mechanisms whereby specific construction, design or advisory services may be procured on an 'as instructed' basis over a set term. Although not a requirement, the FC would normally be used in conjunction with any of the NEC4 suite of contracts. For example, in relation to design or advisory services, the NEC4 Professional Service Contract (PSC) could be used.

Synopsis

1 Roles

- There are two Parties to the Framework Contract, the Client and the Supplier (in pre-NEC4 forms, the Client was referred to as the Employer).
- A Client's Representative is appointed by the Client (this is a new role introduced in NEC4).
- The agreement does not include an obligation to carry out any work or to provide any services; these require a Work Order or a Time Charge Order. A Work Order is a contract to carry out work within the framework scope. A Time Charge Order is a contract to provide advice on a proposed Work Order on a time charge basis.

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NEC4 FC

- The Parties and the Client's Representative shall act in a spirit of mutual trust and co-operation (10.2).
- The Supplier follows the Client's Representative's instructions, attends meetings with the Client's Representative and others as stated in the Framework Information and does not carry out any work unless a Work Order or Time Charge Order for that work is received (20).
- There are clear rules relating to communications (eg instructions, certificates, submissions, records, etc) (13).
- The Supplier is obliged not to do a Corrupt Act (18).

2 Documents

- The contract is set out in two parts: the Conditions of Contract (in NEC3 this section was called Core Clauses) and the Contract Data.
- The clause numbering in the Conditions of Contract more or less follows the numbering of the core clauses of the NEC4 ECC.
- The Contract Data comprises two parts: part one: data provided by the Client and part two: data provided by the Supplier.
- Framework Information specifies how the Parties are to work together and is set out in the document stated in the Contract Data.
- Data provided by the Client includes: contact information, Framework Information, framework scope, selection procedure, quotation procedure, end date, data that apply to all Time Charge Orders and data that apply to all Work Orders.
- Data provided by the Supplier includes: contact information, quotation information, data that apply to all Time Charge Orders and data that apply to all Work Orders.
- Third party rights, under the Contracts (Rights of Third Parties) Act 1999, are neither included nor excluded.
- Work to be carried out under a Time Charge Order or Work Order can be procured under the conditions of any of the NEC4 contracts, such as the NEC4 PSC (for design and advisory services) or the NEC4 ECC or NEC4 ECSC (for construction works).

3 Control: time

- The Client Representative replies to the Supplier's submission of a quotation for a proposed Work Order within the period stated in the Contract Data (23.4).
- The Supplier submits a revised quotation within the period stated in the Client's Representative's instruction (23.5).
- The Supplier does not do any work until a Work Order is received (20).

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NEC4 FC

- After the end date the Client's Representative may not issue a Work Order or Time Charge Order (30.1).
- The Supplier completes the ordered work before the end date.

4 Control: quality

- The Client's Representative provides additional Contract Data, Scope, Site Information and a relevant pricing document for a proposed Work Order (23).
- The Client's reply to the Supplier's submission of a quotation could be to issue either a Work Order accepting the quotation, an instruction for a revised quotation, or a notification that the Work Order will not be issued to the Supplier (23.4).

5 Control: cost

- Where a Supplier is selected for a Time Charge Order, the Client's Representative consults with the Supplier about the contents of the Order and then issues it to the Supplier (22.1).
- The Supplier provides a quotation for a proposed Work Order in accordance with the quotation procedure (23.2). The Client's Representative assesses the Supplier's quotation using the quotation information (23.3).

6 Insurance

- The contract makes no reference to insurance. The requirements for insurance would be those set out in the Contract Data or in the underlying contracts.

7 Termination

- Either Party may terminate its obligations under the contract by notifying the other Party.
- After a Party has notified termination, the Client may not issue a Work Order or Time Charge Order, and the Supplier must complete ordered work before the notification (90).

8 Dispute avoidance and resolution

- The contract does not mention dispute avoidance and resolution. The requirements would be those set out in the Contract Data and in the underlying contracts.

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NEC4 FC

This contract?

If considering using the NEC4 FC, the following points should be borne in mind.

The NEC4 FC is a contract for a framework arrangement and sets up mechanisms whereby specific construction work, design or advisory services may be procured on an 'as instructed' basis over a set term. Although not a requirement, the FC would normally be used in conjunction with another contract from the NEC4 suite.

It is a useful arrangement for the employer in that, once set up, it is possible to arrange for contracts to be awarded without having to tender them competitively, as the prices and terms have already been agreed in principle.

The NEC4 FC provisions are minimal, relying on the parties to provide the additional, and much needed, required information. Such additional information would determine the procurement route, define the scope and clarify relevant legislative requirements.

References and further reading

NEC4 Framework Contract
NEC4: Preparing and Managing a Framework Contract

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International Federation of Consulting Engineers 6

The International Federation of Consulting Engineers (FIDIC), which was founded in 1913, has produced contracts for international construction projects since the 1950s. FIDIC contracts are suitable for different jurisdictions and can be used under various procurement routes, including design-bid-build (and with contractor's design) and design-build, and also for turnkey projects.

The FIDIC contracts are intended for use where the parties to the contract are likely to be from different countries and/or the work is to be carried out in a country where no suitable standard forms are published. In such situations, tenderers generally prefer FIDIC conditions because they are perceived to be 'neutral', rather than terms published and used exclusively in a particular jurisdiction. This may, in turn, result in lower tenders, as the contract risks can be more easily assessed.

The predecessor to the Red Book (for building and engineering works designed by the employer) was published in 1957, based on civil engineering measurement forms used in the UK. In 1999, FIDIC published a revised suite of contracts comprising the Red Book and Yellow Book (for plant and design-build works), together with a Green Book (as the short form of contract) and a Silver Book (for turnkey contracts). In 2011 it published a first edition of a Gold Book for design-build-operate contracts.

The suite has been further updated, with new editions of the Red, Yellow and Silver Books published in 2017.

FIDIC Red Book: Conditions of Contract for Construction

FIDIC Yellow Book: Conditions of Contract for Plant and Design-Build

FIDIC Silver Book: Conditions of Contract for EPC/Turnkey Projects

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FIDIC Red Book

International Federation of Consulting Engineers

FIDIC Conditions of Contract for Construction (second edition, 2017)

The FIDIC Red Book is a popular form of contract for major international construction and infrastructure projects, including building and civil engineering works. It is essentially a straightforward 'traditional' measurement-based contract, where it is assumed the majority of the design will be undertaken by the client's consultant team. The contract requires a contract administrator, the 'Engineer', who plays a key role, including acting as a first stage in resolving party disputes and deciding claims in relation to payment and extensions of time. It also contains many provisions that are not to be found in a contract such as JCT SBC16 but which are essential for international work, such as currency clauses and provisions on labour conditions and war. The dispute resolution provisions are very sophisticated and detailed, and the recently introduced provisions on quality management are of particular note.

Background

The predecessor to the Red Book (for building and engineering works designed by the employer) was published in 1957, based on civil engineering measurement forms used in the UK. In 1999, FIDIC published a revised suite of contracts, in which an updated version of this contract was termed the Red Book. In 2005, FIDIC published an amended version of the Red Book for use by multilateral development banks.

The Red Book remains the most widely used, and is the most common standard form for major international infrastructure projects. The second edition of the FIDIC Red Book, published in 2017, provides:

- revisions to the requirements for notices and other communications, to increase clarity
- new provisions to ensure employer's claims and contractor's claims are treated equally and are separated from disputes
- mechanisms for dispute avoidance
- detailed provisions for quality management and verification of the contractor's compliance with the contract.

Structure

The general conditions are grouped under 21 headings and run to over 120 pages. The Red Book also includes flow charts, an appendix covering dispute resolution and over 60 pages of guidance notes and forms.

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FIDIC Red Book

Use

The Red Book contains detailed guidance on its use and completion. For example, amendments to the form are to be incorporated by the inclusion of 'Particular Conditions' and guidance on how to prepare these is provided.

Synopsis

1 Roles

- The Parties to the contract are defined as the Employer and the Contractor (1.1.60).
- The Contractor is required to execute the Works as described in the contract documents. The Contractor is also required to design any parts of the Works specified in the contract (4.1).
- The Employer must engage an Engineer, who is identified in the Contract Data (3.1). The Engineer is generally deemed to be acting for the Employer (3.2), except that when determining a claim the Engineer is required to 'act neutrally between the Parties and shall not be deemed to act for the Employer' (3.7).
- The Engineer (or, if a legal entity, the natural person appointed to act on its behalf) is required to be a professional engineer with suitable qualifications, experience and competence (3.1). The Employer may replace the named Engineer with 42 days' notice to the Contractor, or immediately if the Engineer is unable to act, for example due to illness or through resignation (3.6).
- The Engineer's role includes issuing instructions, valuing and issuing payment certificates, issuing extensions of time and deciding claims. There is no defined role for a quantity surveyor; the tasks that would be performed by a quantity surveyor under the JCT SBC16 are ascribed to the Engineer.
- The Engineer may appoint a representative, who must be based at the site for the whole period of the works (3.3). The Engineer may delegate such authority as is necessary for the representative to act on behalf of the Engineer at the site. The Engineer may also assign duties and delegate authority to properly qualified assistants, provided that notice is given to the Parties (3.4).
- The Contractor is required to appoint a representative, who has full authority to act for the Contractor. The representative is either named in the contract or is appointed subsequently with the consent of the Employer under clause 4.3. The Contractor's Representative must be 'qualified, experienced and competent in the main engineering discipline applicable to the Works' and be fluent in the language specified in the contract.
- The Contractor must comply with all applicable laws and statutory obligations and give all required notices. The Contractor is entitled to recover fees and charges not otherwise provided for. The Employer must also comply with all applicable laws and

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FIDIC Red Book

statutory obligations, and is obliged to obtain all necessary planning, zoning or similar building permits (1.13).

- The Contractor must notify the Engineer if it finds any discrepancies in the Contract Documents or in any further information issued by the Engineer. The Engineer must issue an instruction and the Contractor is thereafter not liable to the Employer under the contract for any non-compliance with statutory requirements resulting from the instruction (1.5).
- The Contractor's right to subcontract work is restricted. It may not subcontract any part of the Works where the Contract Data states it is not permitted, or where the value would be above a limit stated in the Contract Data. The Contractor must obtain the Engineer's consent to subcontract any other work, except if the subcontract is limited to the supply of materials or the particular subcontractor is already named in the Contract Data (5.1).
- The contract makes provision for 'nominated Subcontractors', who may be named either in the Specification or in an instruction from the Engineer relating to a provisional sum (5.2.1). The Contractor need not employ any nominated Subcontractor to whom it makes reasonable objection (5.2.2). Once engaged, the Contractor is entirely responsible for the performance of the nominated Subcontractor.

2 Documents

- The 'Contract' is defined in clause 1.1 as comprising 'the Contract Agreement, the Letter of Acceptance, the Letter of Tender, any addenda referred to in the Contract Agreement, these Conditions, the Specification, the Drawings, the Schedules, the Contractor's Proposal, the JV Undertaking (if applicable) and the further documents (if any) which are listed in the Contract Agreement or in the Letter of Acceptance' (1.1.10). A bill of quantities, if used, is to be listed in the Schedules (1.1.5).
- Clause 1.5 sets out clearly the order of priority of contract documents. If either Party finds an ambiguity or discrepancy in the documents, it issues a notice to the Engineer, and on receiving the notice (or if the Engineer finds a discrepancy) the Engineer issues a clarification or instruction (1.5).
- An extensive list of definitions is included in clause 1.1. Notable among these are: DAAB (the Dispute Avoidance/Adjudication Board), Foreign Currency, JV Undertaking, QM System (the Contractor's quality management system), Notice of Dissatisfaction (with an Engineer's decision, issued by either Party) and Tests after Completion.
- Rules for interpretation are set out in clause 1.2, including a gender bias clause and that 'execute the Works' means the construction of the Works and remedying of any defects and is deemed to include the design of the works to the extent, if any, specified in the contract.

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- The contract makes no reference to the provision of collateral warranties. It also makes no reference to third party rights, so does not provide for contracting out of third party rights (relating to the Contracts (Rights of Third Parties) Act 1999). If the contract is to be subject to the law of England and Wales, such a provision may need to be added and consideration given to whether collateral warranties are required.
- There is a bar to assignment, such that a Party cannot assign the whole or part of the contract without the consent of the other Party, except that either Party may assign its right to any moneys due as security in favour of a bank or financial institution (1.7).

3 Control: time

- The Commencement Date is as notified by the Engineer to the Contractor (8.1). The Contractor must be notified at least 14 days in advance of the Commencement Date, which is normally within 42 days of the date of the Letter of Acceptance (ie the letter issued by the Employer to the Contractor accepting its tender and effectively forming the contract between them).
- The Contractor must complete the Works within the 'Time for Completion', which is entered in the Contract Data (8.2).
- There is provision for dividing the Works into sections, in which case a separate Time for Completion for each Section will be set out in the Contract Data. All provisions relating to timing (eg extending the date for completion) apply separately to each Section, except that there is only one notice of commencement.
- If the Contractor fails to complete within the Time for Completion, it will be subject to Delay Damages as set out in the Contract Data (8.8).
- The Contractor must submit an initial programme within 28 days of the notice of commencement. The Contractor must also submit a revised programme whenever the current programme no longer accurately reflects current progress or is inconsistent with the Contractor's obligations. The contract sets out detailed requirements as to the content and format of the programme (8.3).
- The Engineer is required to review the programme and give the Contractor notice if the programme does not comply with the contract, in which case the Contractor must submit a revised programme within 14 days (8.3). If the Engineer does not notify the Contractor of non-compliance within specified time limits, it is deemed to have issued a 'Notice of No-objection'.
- If the Contractor considers it may be entitled to an extension of time, it must notify the Engineer as soon as is practicable, and not later than 28 days after the circumstances giving rise to the claim became apparent (20.2.1). Clause 8.5 lists the reasons that might justify an extension, which include 'any delay, impediment or prevention caused by … the Employer'.

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- If the Contractor fails to issue a timely notice it will lose the right to an extension (20.2). The Engineer must inform the Contractor if it thinks the notice was issued out of time, otherwise it is deemed to be a valid notice (20.2.1).
- The Contractor must then submit a fully detailed claim not later than 84 days after the circumstances giving rise to the claim became apparent. The claim must provide all the particulars required by the contract (20.2.3 and 20.2.4). As above, the Engineer must inform the Contractor if it thinks the fully detailed claim was issued out of time, otherwise it is deemed to be a valid notice (20.2.4).
- Following receipt of a claim, the Engineer must consult with both Parties in an endeavour to reach agreement (3.7.1). If agreement is not reached, the Engineer must determine the extension within 42 days of receiving the fully detailed claim (3.7.2 and 3.7.3).
- The Date of Completion is certified by the Engineer in the Taking-Over Certificate (1.1.24). The Contractor may apply for certification by notifying the Engineer at least 14 days before the date it considers the Works will be complete. The Engineer must then, within 28 days of the notice, either issue the Taking-Over Certificate or reject the application giving its reasons (10.1). The Engineer may, at the discretion of the Employer, issue a Taking-Over Certificate for any part of the Works (10.2).

4 Control: quality

- The Contractor is obliged to execute the Works in accordance with the contract and undertakes that when the Works are completed they will be in accordance with the documents forming the contract (4.1).
- Where the Contractor is required to design any part of the Works, the contract states that, when the Works are complete, that part shall be fit for the purposes specified in the contract or, if the purposes are not specified, for its ordinary purposes (4.1(e)). This is a strict liability, which is backed by further strict obligations to ensure that the design of the Works complies with the technical standards stated in the specification and with the legislation of the country (4.1(f)).
- The Contractor is required to submit Contractor's Documents in relation to the designed part and may not begin construction until a Notice of No-objection has been issued by the Engineer (4.1).
- The Contractor is required to prepare and implement a quality management system (QM System), which is submitted to the Engineer within 28 days of the Commencement Date. The Engineer may review the QM System. If the QM System does not comply with the contract, the Engineer may notify the Contractor, in which case the Contractor must submit a revised version within 14 days (4.9.1).
- The Contractor is similarly required to prepare and implement a Compliance Verification System (4.9.2).

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- The contract states that compliance with the QM System or the Compliance Verification System shall not relieve the Contractor from any duty, obligation or responsibility in connection with the contract (4.9.3).
- The Engineer has the power to issue instructions, including those that constitute a Variation to the works (3.5).
- The Engineer or the Contractor can require the other to attend a management meeting. The Engineer is required to make a record of any such meetings and to issue it to all attendees and to the Employer (3.8).
- The Employer's Personnel, which include the Engineer, must have full access to the Site (7.3).
- There are detailed provisions dealing with testing during the Works (7.4) and Tests on Completion (9). If the Works fail to pass the Tests on Completion, various remedies are set out, including that the Engineer may require further tests or that the Employer may request the Engineer to issue a Taking-Over Certificate, with financial compensation to the Employer (9.4).
- There are further requirements for testing after taking over (ie during occupation), and detailed provisions regarding the remedying of defects and/or the failure of the Works to pass these tests, or subsequent retesting (11). Essentially, if any damage appears during the Defects Notification Period, the Contractor is given notice by or on behalf of the Employer and the Contractor submits a proposal for rectifying the defective work (11.1).
- Once the Contractor has completed and tested the Works, remedied all defects and supplied all required documentation, the Engineer is required to issue a Performance Certificate (11.9).

5 Control: cost

- The contract is a measurement form, and the Contract Price is the 'value of the Works in accordance with Sub-Clause 12.3', ie the value as assessed under the measurement rules in the contract (14.1).
- The contract contains provisions allowing for advance payment, with a guarantee, and for repayment of the advance (14.2).
- The Contractor submits Statements to the Engineer at the ends of the periods stated in the Contract Data, stating the amount it considers it is entitled to and providing supporting documentation. The contract gives detailed requirements as to what each Statement should cover, including the value of the executed work, the amount of applicable retention and the amount of various deductions (14.3).
- There is provision for a Schedule of Payments, ie an estimate of the anticipated amounts to be paid. If one is included in the contract, and if progress is found to differ from the estimates on which the schedule is based, the Engineer may revise

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the schedule. If one is not included, the Contractor must provide one, showing the anticipated payments at three-month intervals (14.4).

- The Contract Data may specify that particular plant and materials are to be paid for when shipped or delivered (ie before they are incorporated in the Works), in which case the provisions of clause 14.5 apply.
- No amounts are paid unless and until the Contractor has provided the required Performance Security and has appointed its representative in accordance with the contract (14.6).
- The Engineer must issue an Interim Payment Certificate (IPC) within 28 days of the Contractor's Statement, stating the amount it considers to be due and identifying any differences between the certified amount and the Statement (14.6.1). The contract details what amounts may be withheld in the IPC, including that if work is not in accordance with the contract, the full cost of rectification may be withheld (14.6.2). If the Contractor disagrees with the amounts in an IPC, it may submit a claim to be determined by the Engineer under clause 3.7.
- The Engineer may withhold an IPC if its total value is less than a figure stated in the Contract Data (14.6.2).
- The Employer must pay the amount shown on the IPC within 56 days after the Engineer receives the Statement, or within 28 days after the Employer receives the IPC, or other periods as stated in the Contract Data (14.7). If the payment is delayed, the Contractor is entitled to financing charges (14.8).
- Half of the retention is released after the issue of the Taking-Over Certificate, and the remaining half after the expiry of the Defects Notification Period (14.9).
- The Contractor is required to submit a Statement within 84 days of completion of the Works, setting out the total value of the work done and other matters as set out in clause 14.10, following which the Engineer issues an IPC.
- The Contractor is required to submit a draft final Statement within 56 days of the issuing of the Performance Certificate. The Engineer notifies the Contractor if it disagrees with the draft Statement. The Contractor then issues an agreed 'Final Statement' or a 'Partially Agreed Final Statement', depending on whether, following discussions, the Engineer and Contractor can agree the final amounts (14.11).
- Within 28 days of the above Statement, the Engineer issues the Final Payment Certificate (14.13).

6 Insurance

- Clause 19 sets out the requirements for insurance. The Employer may require the Contractor to provide evidence that the correct insurance has been taken out. If the Contractor fails to take out insurance, the Employer may take out the necessary policies and recover the costs from the Contractor (19.1).

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- The Contractor is to take out joint names insurance for the Works until the date of the Taking-Over Certificate (19.2.1). The Contractor is to take out joint names insurance against loss or damage to goods etc brought onto the Site (19.2.2).
- The Contractor is required to carry professional indemnity insurance to cover its liability for design, details of which should be set out in the Contract Data (19.2.3).
- The Contractor is to take out joint names insurance for injury or for loss of or damage to property other than the Works until the date of the Performance Certificate (19.2.4).
- The Contractor is to take out insurance for injury to employees (19.2.5). The Employer is also to be indemnified against any claims, except to the extent that the injury is due to any act or neglect of the Employer.

7 Termination

- If the Contractor fails to carry out any obligation under the contract, the Engineer may issue a Notice to Correct (15.1). The Contractor must respond, indicating the remedial measures it will take.
- The Employer is allowed to terminate the employment of the Contractor by reason of a range of specified defaults, which include failure to comply with a Notice to Correct or a decision of the Dispute Avoidance/Adjudication Board (DAAB), failure to proceed with the Works and failure to comply with a notice of rejection (15.2). A warning notice is generally required, but not in the case of insolvency or corruption. The consequences of termination are set out in clauses 15.3 and 15.4.
- The Employer may also terminate for its own convenience by means of a 28-day notice (15.5). The consequences of the termination are set out in clauses 15.6 and 15.7.
- The Contractor may suspend work by means of a 21-day notice in the event of specified defaults, including the Engineer's failure to issue a payment certificate.
- The Contractor is allowed to terminate its own employment for specified defaults by the Employer (16.2). Again, a 14-day warning notice is required. In the event of insolvency of the Employer, the Contractor may elect to terminate its own employment.

8 Dispute avoidance and resolution

- The contract contains a sophisticated and detailed multi-tier dispute resolution system. In the first instance, claims for payment or additional time are notified to the Engineer under clause 20.2. Following the notice, the claiming Party must submit a 'fully detailed Claim' to the Engineer within specified time limits (20.2.4). The Engineer then proceeds to determine the claim.

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- The next step is to submit disputes to the DAAB. A full procedure for appointment of the DAAB and the rules it must follow are included in the contract (21.2 to 21.4, the appendix and annex). Once the DAAB has reached its decision, if either Party is not satisfied with the decision it can issue a Notice of Dissatisfaction (NOD). If an NOD is issued, the Parties are required to try to reach an amicable settlement.
- If settlement cannot be reached within 28 days of the NOD, then either Party can take the dispute to arbitration under the rules of the International Chamber of Commerce.

This contract?

If considering using the FIDIC Red Book, the following points should be borne in mind.

The form is intended to be used in an international context and the parties will need to set out key matters, such as the country in which the works are situated, the laws applicable to the contract and the dispute resolution process. The form as published does not have a section for execution, but assumes that the parties have drafted and executed a separate contract agreement. Similarly, there is no provision for entering details about the project: all contract data and special provisions are to be set out in a separate document entitled the 'Particular Conditions'. Guidance on the drafting of these is included at the back of the form.

The contract requires the employer to appoint an engineer to administer its terms, whose role extends beyond the typical role for a contract administrator (eg in a JCT form), to include acting as a first port of call for deciding disputed claims.

The contract is a measurement form, firmly rooted in the tradition of forms developed for civil engineering works. It largely assumes that the contractor will be provided with full information, although it allows for the contractor to design identified parts. The contractor's liability for such design is strict, reflecting the normal level of liability in many jurisdictions in which it might be used. The contractor is fully responsible for the work of all subcontractors, including any that are nominated by the employer. On balance, the contractor takes on more risk with this contract than it does with JCT forms, such as SBC16.

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FIDIC Red Book

References and further reading

FIDIC Conditions of Contract for Construction for building and civil engineering works designed by the Employer (Red Book) (second edition, 2017)
FIDIC Conditions of Subcontract for Construction for building and engineering works designed by the Employer (first edition, 2011)

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FIDIC Yellow Book

International Federation of Consulting Engineers

FIDIC Conditions of Contract for Plant and Design-Build (second edition, 2017)

The FIDIC Yellow Book is intended for major international construction and infrastructure projects where the contractor designs the works, including electrical and mechanical plant, and for building and engineering works. It is a lump sum contract, with a contract administrator, the 'Engineer', playing a key role, including issuing certificates and deciding claims. As with the Red Book, it contains many provisions for international work, such as choice of law and currency clauses and provisions on labour conditions and delivery of goods. The dispute resolution provisions are very sophisticated and detailed, and the recently introduced provisions on quality assurance are of particular note.

Background

The first FIDIC contract for design-build procurement was the Orange Book, published in 1995. This was replaced by the Yellow Book in 1999, when FIDIC published a revised suite of contracts.

The suite has now been updated and new editions of the Red, Yellow and Silver Books were published in 2017. This second edition of the FIDIC Yellow Book provides:

- revisions to the requirements for notices and other communications, to increase clarity
- new provisions to ensure employer's claims and contractor's claims are treated equally and are separated from disputes
- mechanisms for dispute avoidance
- detailed provisions for quality management and verification of the contractor's compliance with the contract.

Structure

The structure is the same as that of the Red Book, with many clauses in common, and with the clause numbering following the same sequence. The general conditions are grouped under 21 headings and run to over 100 pages. In addition, the Yellow Book also includes flow charts, an appendix covering dispute resolution, an annex setting out the DAAB procedural rules and over 60 pages of guidance notes.

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FIDIC Yellow Book

Use

The FIDIC contracts are intended for use in an international context, ie where the parties to the contract are likely to be from different countries and/or the work is to be carried out in a country where no suitable standard forms are published.

The Yellow Book can be used for a variety of project types, including plant and mechanical works, as well as building or infrastructure projects.

The contract contains detailed guidance on its use and completion. For example, amendments to the form are to be incorporated by the inclusion of 'Particular Conditions' and guidance on how to prepare these is provided.

Synopsis

1 Roles

- The Parties to the contract are defined as the Employer and the Contractor (1.1.60).
- The Contractor is required to execute the Works in accordance with the contract, so that when complete the Works are fit for the purposes defined in the Employer's Requirements or, if none are defined, for their ordinary purposes (4.1).
- The Contractor is required to design the Works. The designers engaged must be qualified, experienced and competent engineers or other professionals, and their details and experience must be submitted to the Engineer for consent (5.1).
- It is the Contractor's duty to comply with all applicable laws and statutory obligations and to give all required notices. The Contractor is entitled to recover fees and charges not otherwise provided for. The Employer is obliged to obtain all necessary planning, zoning or similar building permits (1.13).
- The Employer must engage an Engineer, who is identified in the Contract Data (3.1). The Engineer is generally deemed to be acting for the Employer (3.2), except that when determining a claim the Engineer is required to 'act neutrally between the Parties and shall not be deemed to act for the Employer' (3.7).
- The Engineer (or, if a legal entity, the natural person appointed to act on its behalf) is required to be a professional engineer with suitable qualifications, experience and competence (3.1). The Employer may replace the named Engineer with 42 days' notice to the Contractor, or immediately if the Engineer is unable to act, for example due to illness or through resignation (3.6).
- The Engineer's role includes issuing instructions, valuing and issuing payment certificates, issuing extensions of time and deciding claims. There is no defined role for a quantity surveyor; the tasks that would be performed by a quantity surveyor under the JCT SBC16 are ascribed to the Engineer.
- The Contractor is required to appoint a representative, who has full authority to act for the Contractor. The representative is either named in the contract or is appointed

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FIDIC Yellow Book

subsequently with the consent of the Employer under clause 4.3. The Contractor's Representative must be 'qualified, experienced and competent in the main engineering discipline applicable to the Works' and be fluent in the language specified in the contract.

- The Contractor's right to subcontract work is restricted. It may not subcontract any part of the Works where the Contract Data states it is not permitted, or where the value would be above a limit stated in the Contract Data. The Contractor must obtain the Engineer's consent to subcontract any other work, except if the subcontract is limited to the supply of materials or the particular subcontractor is already named in the Contract Data (4.4).
- The contract makes provision for 'nominated Subcontractors', who may be named either in the Specification or in an instruction from the Engineer relating to a provisional sum (4.5). The Contractor need not employ any nominated Subcontractor to whom it makes reasonable objection (4.5.1). Once engaged, the Contractor is entirely responsible for the performance of the nominated Subcontractor.

2 Documents

- The 'Contract' is defined as comprising 'the Contract Agreement, the Letter of Acceptance, the Letter of Tender, any addenda referred to in the Contract Agreement, these Conditions, the Employer's Requirements, the Schedules, the Contractor's Proposal, the JV Undertaking (if applicable) and the further documents (if any) which are listed in the Contract Agreement or in the Letter of Acceptance' (1.1.9).
- Clause 1.5 sets out clearly the order of priority of contract documents. The Employer's Requirements prevail over the Contractor's Proposal. If either Party finds an ambiguity or discrepancy in the documents, it issues a notice to the Engineer, and on receiving the notice (or if the Engineer finds a discrepancy) the Engineer issues a clarification or instruction (1.5). The Contractor is thereafter not liable to the Employer under the contract for any non-compliance with statutory requirements resulting from the instruction (1.5).
- The Contractor is required to scrutinise the Employer's Requirements and, if it finds an error, to notify the Engineer. The Engineer determines whether the error is a matter that an experienced contractor should have noticed, and what measures the Contractor must now take. The Contractor is compensated only if it could not have been expected to detect the error (1.9).
- An extensive list of definitions is included in clause 1.1. Notable among these are: DAAB (the Dispute Avoidance/Adjudication Board), Foreign Currency, JV Undertaking, QM System (the Contractor's quality management system), Notice of Dissatisfaction (with an Engineer's decision, issued by either Party) and 'Tests after Completion'.

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- Rules for interpretation are set out in clause 1.2, including a gender bias clause, and that 'execute the Works' means the design, construction and completion of the Works and remedying of any defects.
- The contract makes no reference to the provision of collateral warranties. It also makes no reference to third party rights, so does not provide for contracting out of third party rights (relating to the Contracts (Rights of Third Parties) Act 1999). If the contract is to be subject to the law of England and Wales, such a provision may need to be added and consideration given to whether collateral warranties are required.
- There is a bar to assignment, such that a Party cannot assign the whole or part of the contract without the consent of the other Party, except that either Party may assign its right to any moneys due as security in favour of a bank or financial institution (1.7).

3 Control: time

- The Commencement Date is as notified by the Engineer to the Contractor (8.1). The Contractor must be notified at least 14 days in advance of the Commencement Date, which is normally within 42 days of the date of the Letter of Acceptance (ie the letter issued by the Employer to the Contractor accepting its tender and effectively forming the contract between them).
- The Contractor must complete the Works within the 'Time for Completion', which is entered in the Contract Data (8.2).
- There is provision for dividing the Works into sections, in which case a separate Time for Completion for each Section will be set out in the Contract Data. All provisions relating to timing (eg extending the date for completion) apply separately to each Section, except that there is only one notice of commencement.
- If the Contractor fails to complete within the Time for Completion, it will be subject to Delay Damages as set out in the Contract Data (8.8).
- The Contractor must submit an initial programme within 28 days of the notice of commencement. The Contractor must also submit a revised programme whenever the current programme no longer accurately reflects current progress or is inconsistent with the Contractor's obligations. The contract sets out detailed requirements as to the content and format of the programme (8.3).
- The Engineer is required to review the programme and give the Contractor notice if the programme does not comply with the contract, in which case the Contractor must submit a revised programme within 14 days (8.3). If the Engineer does not notify the Contractor of non-compliance within specified time limits, it is deemed to have issued a 'Notice of No-objection'.
- If the Contractor considers it may be entitled to an extension of time, it must notify the Engineer as soon as is practicable, and not later than 28 days after the circumstances giving rise to the claim became apparent (20.2.1). Clause 8.5 lists the

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reasons that might justify an extension, which include 'any delay, impediment or prevention caused by … the Employer'.

- If the Contractor fails to issue a timely notice it will lose the right to an extension (20.2). The Engineer must inform the Contractor if it thinks the notice was issued out of time, otherwise it is deemed to be a valid notice (20.2.1).
- The Contractor must then submit a fully detailed claim not later than 84 days after the circumstances giving rise to the claim became apparent. The claim must provide all the particulars required by the contract (20.2.3 and 20.2.4). As above, the Engineer must inform the Contractor if it thinks the fully detailed claim was issued out of time, otherwise it is deemed to be a valid notice (20.2.4).
- Following receipt of a claim, the Engineer must consult with both Parties in an endeavour to reach agreement (3.7.1). If agreement is not reached, the Engineer must determine the extension within 42 days of receiving the fully detailed claim (3.7.2 and 3.7.3).
- The Date of Completion is certified by the Engineer in the Taking-Over Certificate (1.1.24). The Contractor may apply for certification by notifying the Engineer at least 14 days before the date it considers the Works will be complete. The Engineer must then, within 28 days of the notice, either issue the Taking-Over Certificate or reject the application giving its reasons (10.1). The Engineer may, at the discretion of the Employer, issue a Taking-Over Certificate for any part of the Works (10.2).

4 Control: quality

- The Contractor is obliged to execute the Works in accordance with the contract and undertakes that when the Works are completed they will be fit for the purposes defined in the Employer's Requirements or, if none are defined, for their ordinary purposes (4.1). This is a strict liability, which is backed by further strict obligations to ensure that the design of the Works complies with the country's legislation and the contract (5.3) and with the country's technical standards (5.4).
- The Contractor is required to submit for review all Contractor's Documents that the Employer's Requirements or the conditions of contract require. The Employer must either notify the Contractor that the documents fail to comply with the requirements and/or the contract or issue a Notice of No-objection. The Engineer may require further documents, in which case the Contractor is not entitled to an extension of time for any delay caused and the Employer may be entitled to additional costs (5.2.2).
- The Contractor is required to prepare and implement a quality management system (QM System), which is submitted to the Engineer within 28 days of the Commencement Date. The Engineer may review the QM system. If the QM System does not comply with the contract, the Engineer may notify the Contractor, in which case the Contractor must submit a revised version within 14 days (4.9.1).

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- The Contractor is similarly required to prepare and implement a Compliance Verification System (4.9.2).
- The contract states that compliance with the QM System or the Compliance Verification System shall not relieve the Contractor from any duty, obligation or responsibility in connection with the contract (4.9.3).
- The Engineer has the power to issue instructions, including those that constitute a Variation to the works (3.5).
- The Engineer or the Contractor can require the other to attend a management meeting. The Engineer is required to make a record of any such meetings and to issue it to all attendees and to the Employer (3.8).
- The Employer's Personnel, which include the Engineer, must have full access to the Site (7.3).
- There are detailed provisions dealing with testing during the Works (7.4) and Tests on Completion (9). If the Works fail to pass the Tests on Completion, various remedies are set out, including that the Engineer may require further tests, or that the Employer may request the Engineer to issue a Taking-Over Certificate, with financial compensation to the Employer (9.4).
- There are further requirements for testing after taking over (ie during occupation) and detailed provisions regarding the remedying of defects and/or the failure of the Works to pass these tests, or subsequent retesting (11). Essentially, if any damage appears during the Defects Notification Period, the Contractor is given notice by or on behalf of the Employer and the Contractor submits a proposal for rectifying the defective work (11.1).
- Once the Contractor has completed and tested the works, remedied all defects and supplied all required documentation, the Engineer is required to issue a Performance Certificate (11.9).

5 Control: cost

- The Contract Price is the 'lump sum Accepted Contract Amount', ie the sum stated in the Letter of Acceptance following tender (14.1).
- The contract contains provisions allowing for advance payment, with a guarantee, and for repayment of the advance (14.2).
- The Contractor submits Statements at the ends of the periods stated in the Contract Data, stating the amount it considers it is entitled to and providing supporting documentation. The contract gives detailed requirements as to what each Statement should cover, including the value of the executed work, the amount of applicable retention and the amount of various deductions (14.3).
- There is provision for a Schedule of Payments, ie an estimate of the anticipated amounts to be paid. If one is included in the contract, and if progress is found to

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differ from the estimates on which the schedule is based, the Engineer may revise the schedule. If one is not included, the Contractor must provide one, showing the anticipated payments at three-month intervals (14.4).

- The Contract Data may specify that particular plant and materials are to be paid for when shipped or delivered (ie before they are incorporated in the Works), in which case the provisions of clause 14.5 apply.
- No amounts are paid unless and until the Contractor has provided the required Performance Security and has appointed its representative in accordance with the contract (14.6).
- The Engineer must issue an Interim Payment Certificate (IPC) within 28 days of the Contractor's Statement, stating the amount it considers to be due and identifying any differences between the certified amount and the Statement (14.6.1). The contract details what amounts may be withheld in the IPC, including that if work is not in accordance with the contract, the full cost of rectification may be withheld (14.6.2). If the Contractor disagrees with the amounts in an IPC, it may submit a claim to be determined by the Engineer under clause 3.7.
- The Engineer may withhold an IPC if its total value is less than a figure stated in the Contract Data (14.6.2).
- The Employer must pay the amount shown on the IPC within 56 days after the Engineer receives the Statement, or within 28 days after the Employer receives the IPC, or other periods as stated in the Contract Data (14.7). If the payment is delayed, the Contractor is entitled to financing charges (14.8).
- Half of the retention is released after the issue of the Taking-Over Certificate and the remaining half after the expiry of the Defects Notification Period (14.9).
- The Contractor is required to submit a Statement within 84 days of completion of the Works, setting out the total value of the work done and other matters as set out in clause 14.10, following which the Engineer issues an IPC.
- The Contractor is required to submit a draft final Statement within 56 days of the issuing of the Performance Certificate. The Engineer notifies the Contractor if it disagrees with the draft Statement. The Contractor then issues an agreed 'Final Statement' or a 'Partially Agreed Final Statement', depending on whether, following discussions, the Engineer and Contractor can agree the final amounts (14.11).
- Within 28 days of the above Statement, the Engineer issues the Final Payment Certificate (14.13).

6 Insurance

- Clause 19 sets out the requirements for insurance. The Employer may require the Contractor to provide evidence that the correct insurance has been taken out. If the Contractor fails to take out insurance, the Employer may take out the necessary policies and recover the costs from the Contractor (19.1).

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- The Contractor is to take out joint names insurance for the Works until the date of the Taking-Over Certificate (19.2.1). The Contractor is to take out joint names insurance against loss or damage to goods etc brought onto the Site (19.2.2).
- The Contractor is required to carry professional indemnity insurance to cover its liability for design, details of which should be set out in the Contract Data (19.2.3).
- The Contractor is to take out joint names insurance for injury or for loss of or damage to property other than the Works until the date of the Performance Certificate (19.2.4).
- The Contractor is to take out insurance for injury to employees (19.2.5). The Employer is also to be indemnified against any claims, except to the extent that the injury is due to any act or neglect of the Employer.

7 Termination

- If the Contractor fails to carry out any obligation under the contract, the Engineer may issue a 'Notice to Correct' (15.1). The Contractor must respond, indicating the remedial measures it will take.
- The Employer is allowed to terminate the employment of the Contractor by reason of a range of specified defaults, which include failure to comply with a Notice to Correct or a decision of the Dispute Avoidance/Adjudication Board (DAAB), failure to proceed with the Works and failure to comply with a notice of rejection (15.2). A warning notice is generally required, but not in the case of insolvency or corruption. The consequences of termination are set out in clauses 15.3 and 15.4.
- The Employer may also terminate for its own convenience by means of a 28-day notice (15.5). The consequences of the termination are set out in clauses 15.6 and 15.7.
- The Contractor may suspend work by means of a 21-day notice in the event of specified defaults, including the Engineer's failure to issue a payment certificate.
- The Contractor is allowed to terminate its own employment for specified defaults by the Employer (16.2). Again, a 14-day warning notice is required. In the event of insolvency of the Employer, the Contractor may elect to terminate its own employment.

8 Dispute avoidance and resolution

- The contract contains a sophisticated and detailed multi-tier dispute resolution system. In the first instance, claims for payment or additional time are notified to the Engineer under clause 20.2. Following the notice, the claiming Party must submit a 'fully detailed Claim' to the Engineer within specified time limits (20.2.4). The Engineer then proceeds to determine the claim.

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- The next step is to submit disputes to the DAAB. A full procedure for appointment of the DAAB and the rules it must follow are included in the contract (21.2 to 21.4, the appendix and annex). Once the DAAB has reached its decision, if either Party is not satisfied with the decision it can issue a Notice of Dissatisfaction (NOD). If an NOD is issued, the Parties are required to try to reach an amicable settlement.
- If settlement cannot be reached within 28 days of the NOD, then either Party can take the dispute to arbitration under the rules of the International Chamber of Commerce.

This contract?

If considering using the FIDIC Yellow Book, the following points should be borne in mind.

The form is intended to be used in an international context and the parties will need to set out key matters, such as the country in which the works are situated, the laws applicable to the contract and the dispute resolution process. The form as published does not have a section for execution but assumes that the parties have drafted and executed a separate contract agreement. Similarly, there is no provision for entering details about the project: all contract data and special provisions are to be set out in a separate document entitled the 'Particular Conditions'. Guidance on the drafting of these is included at the back of the form.

The contractor is responsible for the design of the project, except that it is not liable for errors in the employer's requirements that an experienced contractor would not have discovered. The contractor is required to provide a project that meets the employer's requirements in all respects, ie it has a strict liability, reflecting the normal level of liability in many jurisdictions in which it might be used. The contract sets out requirements regarding the designers engaged by the contractor, whose details must be submitted to the engineer for consent (5.1).

Unlike many design-build standard form contracts, the Yellow Book requires the employer to appoint an engineer to administer its terms, whose role extends beyond the typical role for a contract administrator (eg in a JCT form), to include acting as a first port of call for deciding disputed claims.

The contractor is fully responsible for the work of all subcontractors, including any that are nominated by the employer. On balance, the contractor takes on considerably more risk with this contract than it does with JCT forms, such as DBC16.

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References and further reading

FIDIC Conditions of Contract for Plant and Design-Build for electrical and mechanical plant, and for building and engineering works, designed by the Contractor (second edition, 2017)
FIDIC Conditions of Subcontract for Construction for building and engineering works designed by the Employer (first edition, 2011)

FIDIC, *Selection of Contractors: Proposed Alternative Mechanisms to Award Construction Works Contracts*, 1st edition, Geneva: FIDIC (2017)
FIDIC, *Which FIDIC Contract Should I Use?* (2019). Online at: fidic.org/bookshop/about-bookshop/which-fidic-contract-should-i-use
Glover, J. and Hughes, S. *Understanding the FIDIC Red and Yellow Books*, 3rd edition, London: Sweet & Maxwell (2018)

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FIDIC Silver Book

International Federation of Consulting Engineers

FIDIC Conditions of Contract for EPC/Turnkey Projects (second edition, 2017)

The FIDIC Silver Book is the most recent form developed by FIDIC for major international construction and infrastructure projects. It is intended for projects where the employer wishes the contractor to take full responsibility for design, including for any design supplied with the employer's requirements, and is generally considered to be a form whereby the contractor accepts more risk that it would with other FIDC contracts. There is no role for an independent 'Engineer' or contract administrator, and the tasks normally ascribed to the engineer are generally undertaken by the employer's representative, including deciding all claims in the first instance. As with other FIDIC contracts, it contains many provisions not to be found in a contract such as JCT SBC16 but which are essential for international work, such as currency clauses and provisions on labour conditions and war. The dispute resolution provisions are very sophisticated and detailed, and the provisions on quality assurance are of particular note.

Background

The abbreviation EPC in the title of the form stands for 'engineering, procurement and construction', which is a particular form of procurement used in some industries. Where this method is used, the EPC contractor is made responsible for the complete project, from design, procurement, construction and commissioning through to handover of the project to the end-user or owner.

The first edition of the Silver Book was published in 1999, in response to requests for a form that would provide greater certainty of final price and completion date, as well as allowing a single point of responsibility for design. This type of contract was particularly called for by lenders to construction projects, where the traditional allocation of risks, such as that in FIDIC's Red and Yellow Books, was not achieving sufficient certainty of outcome.

The suite was updated in 2007 and again in 2017.

Structure

The structure of the contract follows that of the Red and Yellow Books, with the general conditions being grouped under 21 headings and running to over 120 pages. The Silver Book also includes flow charts, an appendix covering dispute resolution and over 60 pages of guidance notes.

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Use

The FIDIC contracts are intended for use in an international context, ie where the parties to the contract are likely to be from different countries and/or the work is to be carried out in a country where no suitable standard forms are published. In such situations, tenderers generally prefer FIDIC conditions, which are perceived to be 'neutral', rather than terms published and used exclusively in a particular jurisdiction. This may, in turn, result in lower tenders, as the contract risks can be more easily assessed.

The Silver Book contains detailed guidance on its use and completion. For example, amendments to the form are to be incorporated by the inclusion of 'Particular Conditions' and guidance on how to prepare these is provided.

Synopsis

1 Roles

- The Parties to the contract are defined as the Employer and the Contractor (1.1.51).
- The Contractor is required to execute the Works in accordance with the contract so that, when they are complete, the Works will be fit for the purposes defined in the Employer's Requirements or, if none are defined, for their ordinary purposes (4.1).
- The Contractor must comply with all applicable laws and statutory obligations and give all required notices. The Contractor is entitled to recover fees and charges not otherwise provided for. The Employer is obliged to obtain all necessary planning, zoning or similar building permits (1.12).
- The Contractor is required to design the Works and is responsible for the accuracy of the Employer's Requirements, with limited exceptions (5.1).
- The designers engaged must be qualified, experienced and competent engineers or other professionals (5.1).
- The Employer must engage an Employer's Representative, who is identified in the Contract Data (3.1). The Employer's Representative is generally deemed to be acting for the Employer (3.1), except that when carrying out the duties under clause 3.5 (agreement or determination) the Employer's Representative 'shall not be deemed to act for the Employer' (3.5).
- The Employer's Representative is not required to be a professional engineer or to have any particular experience.
- The Contractor is required to appoint a representative, who has full authority to act for the Contractor. The representative is either named in the contract or is appointed subsequently with the consent of the Employer under clause 4.3. The Contractor's Representative must be 'qualified, experienced and competent in the main

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engineering discipline applicable to the Works' and be fluent in the language specified in the contract.

- The Contractor's right to subcontract work is restricted. It may not subcontract any part of the Works where the Contract Data states it is not permitted or where the value would be above a limit stated in the Contract Data (4.4).
- The contract makes provision for 'nominated Subcontractors', who may be named either in the Employer's Requirements or in an Employer's instruction (4.5). The Contractor need not employ any instructed nominated Subcontractor to whom it makes reasonable objection (4.5.1). Once engaged, the Contractor is entirely responsible for the performance of the nominated Subcontractor.

2 Documents

- The 'Contract' is defined in clause 1.1 as comprising 'the Contract Agreement, any addenda referred to in the Contract Agreement, these Conditions, the Employer's Requirements, the Schedules, the Tender, the JV Undertaking (if applicable) and the further documents (if any) which are listed in the Contract Agreement' (1.1.7).
- Clause 1.5 sets out clearly the order of priority of contract documents. The Employer's Requirements prevail over the Tender. If either Party finds an ambiguity or discrepancy in the documents, it issues a notice to the other Party and, on receiving the notice, the Employer issues a clarification or instruction (1.5).
- The Contractor is deemed to have scrutinised the Employer's Requirements and is responsible for any inaccuracies (5.1).
- An extensive list of definitions is included in clause 1.1. Notable among these are: DAAB (the Dispute Avoidance/Adjudication Board), Foreign Currency, JV Undertaking, Notice of Dissatisfaction (with a decision by the Employer's Representative, issued by either Party), QM System (the Contractor's quality management system) and Tests after Completion.
- Rules for interpretation are set out in clause 1.2, including a gender bias clause and that 'execute the Works' means the design, construction and completion of the Works and remedying of any defects.
- The contract makes no reference to the provision of collateral warranties. It also makes no reference to third party rights, so does not provide for contracting out of third party rights (relating to the Contracts (Rights of Third Parties) Act 1999). If the contract is to be subject to the law of England and Wales, such a provision may need to be added and consideration given to whether collateral warranties are required.
- There is a bar to assignment, such that a Party cannot assign the whole or part of the contract without the consent of the other Party, except that either Party may assign its right to any moneys due as security in favour of a bank or financial institution (1.7).

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3 Control: time

- The Commencement Date is as notified by the Employer to the Contractor (8.1). The Contractor must be notified at least 14 days in advance of the Commencement Date, which is normally within 42 days after the date the contract comes into full force.
- The Contractor must complete the Works within the 'Time for Completion', which is entered in the Contract Data (8.2).
- There is provision for dividing the Works into sections, in which case a separate Time for Completion for each Section will be set out in the Contract Data. All provisions relating to timing (eg extending the date for completion) apply separately to each Section, except that there is only one notice of commencement.
- If the Contractor fails to complete within the Time for Completion, it will be subject to Delay Damages as set out in the Contract Data (8.8).
- The Contractor must submit an initial programme to the Employer within 28 days of the notice of commencement. The Contractor must also submit a revised programme whenever the current programme no longer accurately reflects current progress or is inconsistent with the Contractor's obligations. The contract sets out detailed requirements as to the content and format of the programme (8.3).
- The Employer is required to review the programme and give the Contractor notice if the programme does not comply with the contract, in which case the Contractor must submit a revised programme within 14 days (8.3). If the Employer does not notify the Contractor of non-compliance within specified time limits, it is deemed to have issued a 'Notice of No-objection'.
- Following receipt of a claim, the Employer's Representative must consult with both Parties in an endeavour to reach agreement (3.5.1). If agreement is not reached, the Employer's Representative must determine the extension within 42 days of receiving the fully detailed claim (3.5.2 and 3.5.3).
- If the Contractor considers it may be entitled to an extension of time, it must notify the Employer as soon as is practicable, and not later than 28 days after the circumstances giving rise to the claim became apparent (20.2.1). Clause 8.5 lists the reasons that might justify an extension, which include 'any delay, impediment or prevention caused by … the Employer'.
- If the Contractor fails to issue a timely notice it will lose the right to an extension (20.2). The Employer must inform the Contractor if it thinks the notice was issued out of time, otherwise it is deemed to be a valid notice (20.2.2).
- The Contractor must then submit a fully detailed claim not later than 84 days after the circumstances giving rise to the claim became apparent. The claim must provide

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all the particulars required by the contract (20.2.4). As above, the Employer's Representative must inform the Contractor if it thinks the fully detailed claim was issued out of time, otherwise it is deemed to be a valid notice (20.2.4).

- The Date of Completion is certified by the Employer in the Taking-Over Certificate (1.1.21). The Contractor may apply for certification by notifying the Employer at least 14 days before the date it considers the Works will be complete. The Employer must then, within 28 days of the notice, either issue the Taking-Over Certificate or reject the application giving its reasons (10.1). Parts of the Works may be taken over earlier if agreed or as stated in the Employer's Requirements (10.2).

4 Control: quality

- The Contractor is obliged to execute the Works in accordance with the Contract and undertakes that when the Works are completed they will be fit for the purposes defined in the Employer's Requirements or, if none are defined, for their ordinary purposes (4.1). This is a strict liability, which is backed by further strict obligations to ensure that the design of the Works complies with the country's legislation and the contract (5.3) and with the country's technical standards (5.4).
- The Contractor is required to submit for review all Contractor's Documents that the Employer's Requirements or the conditions of contract require. The Employer must either notify the Contractor that the documents fail to comply with the requirements and/or the contract or issue a Notice of No-objection. The Employer may require further documents, in which case the Contractor is not entitled to an extension of time for any delay caused and the Employer may be entitled to additional costs (5.2.2).
- The Contractor is required to prepare and implement a quality management system (QM System), which is submitted to the Employer within 28 days of the Commencement Date (4.9.1).
- The Contractor is similarly required to prepare and implement a Compliance Verification System (4.9.2).
- There are detailed provisions dealing with testing during the Works (7.4) and Tests on Completion (9). If the Works fail to pass the Tests on Completion, various remedies are set out, including that the Employer may require further tests, may reject the whole of the Works or may issue a Taking-Over Certificate, with financial compensation to the Employer (9.4).
- There are further requirements for testing after taking over (ie during occupation), and detailed provisions regarding the remedying of defects and/or the failure of the Works to pass these tests, or subsequent retesting (11). Essentially, if any damage appears during the Defects Notification Period, the Contractor is given notice by or on behalf of the Employer, and the Contractor submits a proposal for rectifying the defective work (11.1).

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- Once the Contractor has completed and tested the Works, remedied all defects and supplied all required documentation, the Employer is required to issue a Performance Certificate (11.9).
- The contract states that compliance with the QM System or the Compliance Verification System shall not relieve the Contractor from any duty, obligation or responsibility in connection with the contract (4.9.3).
- The Employer has power to issue instructions, including those that constitute a Variation to the works (3.4).
- Either Party may require the other to attend a management meeting, and the Employer is required to make a record of such meetings and issue it to all those attending (3.6).
- The Employer's Personnel must have full access to the Site (7.3).

5 Control: cost

- The Contract Price is the lump sum amount stated in the Contract Agreement, although the amount to be paid is subject to adjustment under the contract terms (14.1).
- The contract contains provisions allowing for advance payment, with a guarantee, and for repayment of the advance (14.2).
- The Contractor submits Statements to the Employer at the ends of the periods stated in the Contract Data, stating the amount it considers it is entitled to and providing supporting documentation. The contract gives detailed requirements as to what each Statement should cover, including the value of the executed work, the amount of applicable retention and the amount of various deductions (14.3).
- There is provision for a Schedule of Payments, ie an estimate of the anticipated amounts to be paid. If one is included in the contract, and if progress is found to differ from the estimates on which the schedule is based, the Employer's Representative may revise the schedule. If one is not included, the Contractor must provide one, showing the anticipated payments at three-month intervals (14.4).
- The Contract Data may specify that particular plant and materials are to be paid for when shipped or delivered (ie before they are incorporated in the Works), in which case the provisions of clause 14.5 apply.
- No amounts are paid unless and until the Contractor has provided the required Performance Security and has appointed its representative in accordance with the contract (14.6).
- The Employer must issue a notice of interim payment within 28 days of the Contractor's Statement, stating the amount it considers to be due and identifying any differences between the certified amount and the Statement (14.6.1). The

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contract details what amounts may be withheld, including that if work is not in accordance with the contract then the full cost of rectification may be withheld (14.6.2). If the Contractor disagrees with the amounts in any notice, it may submit a claim to be determined by the Employer's Representative under clause 3.5.

- The Employer may withhold an interim payment if its total value is less than a figure stated in the Contract Data (14.6.2).
- The Employer must pay the amount due within 56 days after it receives the Statement (14.7). If the payment is delayed, the Contractor is entitled to financing charges (14.8).
- Half of the retention is released after the issue of the Taking-Over Certificate and the remaining half after the expiry of the Defects Notification Period (14.9).
- The Contractor is required to submit a Statement within 84 days of completion of the Works, setting out the total value of the work done and other matters as set out in clause 14.10, following which the Employer issues a notice of interim payment.
- The Contractor is required to submit a draft final Statement within 56 days of the issuing of the Performance Certificate. The Employer notifies the Contractor if it disagrees with the draft Statement. The Contractor then issues an agreed 'Final Statement' or a 'Partially Agreed Final Statement', depending on whether, following discussions, the Employer and Contractor can agree the final amounts (14.11).
- Within 28 days of the above Statement, the Employer issues the notice of final payment (14.13).

6 Insurance

- Clause 19 sets out the requirements for insurance. The Employer may require the Contractor to provide evidence that the correct insurance has been taken out. If the Contractor fails to take out insurance, the Employer may take out the necessary policies and recover the costs from the Contractor (19.1).
- The Contractor is to take out joint names insurance for the Works until the date of the Taking-Over Certificate (19.2.1). The Contractor is to take out joint names insurance against loss or damage to goods etc brought onto the Site (19.2.2).
- The Contractor is required to carry professional indemnity insurance to cover its liability for design, details of which should be set out in the Contract Data (19.2.3).
- The Contractor is to take out joint names insurance for injury or for loss of or damage to property other than the Works until the date of the Performance Certificate (19.2.4).
- The Contractor is to take out insurance for injury to employees (19.2.5). The Employer is also to be indemnified against any claims, except to the extent that the injury is due to any act or neglect of the Employer.

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7 Termination

- If the Contractor fails to carry out any obligation under the contract, the Employer may issue a 'Notice to Correct' (15.1). The Contractor must respond, indicating the remedial measures it will take.
- The Employer is allowed to terminate the employment of the Contractor by reason of a range of specified defaults, which include failure to comply with a Notice to Correct or a decision of the Dispute Avoidance/Adjudication Board (DAAB), failure to proceed with the Works and failure to comply with a notice of rejection (15.2). A warning notice is generally required, but not in the case of insolvency or corruption. The consequences of termination are set out in clauses 15.3 and 15.4.
- The Employer may also terminate for its own convenience by means of a 28-day notice (15.5). The consequences of the termination are set out in clauses 15.6 and 15.7.
- The Contractor may suspend work by means of a 21-day notice in the event of specified defaults, including the Employer's failure to issue a payment notice (16.1).
- The Contractor is allowed to terminate its own employment for specified defaults by the Employer (16.2). Again, a 14-day warning notice is required. In the event of insolvency of the Employer, the Contractor may elect to terminate its own employment.

8 Dispute avoidance and resolution

- The contract contains a sophisticated and detailed multi-tier dispute resolution system. In the first instance, claims (in relation to payment, additional time, the Defects Notification Period, etc) are notified to the other Party under clause 20.2. Following the notice, the claiming Party must submit a 'fully detailed Claim' to the Employer's Representative within specified time limits (20.2.4). Then, either the claim is agreed between the Parties or the Employer's Representative proceeds to determine the claim (20.2.5).
- The next step is to submit disputes to the DAAB. A full procedure for appointment of the DAAB and the rules it must follow are included in the contract (21.2 to 21.4, the appendix and annex). Once the DAAB has reached its decision, if either Party is not satisfied with the decision it can issue a Notice of Dissatisfaction (NOD). If an NOD is issued, the Parties are required to try to reach an amicable settlement.
- If settlement cannot be reached within 28 days of the NOD, then either Party can take the dispute to arbitration under the rules of the International Chamber of Commerce.

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FIDIC Silver Book

This contract?

If considering using the FIDIC Silver Book, the following points should be borne in mind.

The form is intended to be used in an international context and the parties will need to set out key matters, such as the country in which the works are situated, the laws applicable to the contract and the dispute resolution process. The form as published does not have a section for execution, but assumes that the parties have drafted and executed a separate contract agreement. Similarly, there is no provision for entering details about the project: all contract data and special provisions are to be set out in a separate document entitled the 'Particular Conditions'. Guidance on the drafting of these is included at the back of the form.

The contractor takes on a high level of risk with this contract. Not only is it responsible for the design of the project, it also takes on liability for any errors in the employer's requirements and information provided to it at tender stage. The contractor has a strict liability to provide a project that meets the employer's requirements in all respects.

Unlike the Red and Yellow Books, the Silver Book does not require the appointment of an independent engineer. Instead, the employer's representative initially determines all claims. If the contractor disagrees with this determination, it would need to raise a dispute with the DAAB under the contractual procedures.

The contractor is fully responsible for the work of all subcontractors, including any that are nominated by the Employer.

References and further reading

FIDIC Conditions of Contract for EPC/Turnkey Projects (second edition, 2017)
FIDIC Conditions of Subcontract for Construction for building and engineering works designed by the Employer (first edition, 2011)

FIDIC, *Selection of Contractors: Proposed Alternative Mechanisms to Award Construction Works Contracts*, 1st edition, Geneva: FIDIC (2017)
FIDIC, *Which FIDIC Contract Should I Use?* (2019). Online at: fidic.org/bookshop/about-bookshop/which-fidic-contract-should-i-use

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Association for Consultancy and Engineering and Civil Engineering Contractors Association

7

The Association for Consultancy and Engineering (ACE) was established in 1913 as the Association of Consulting Engineers and gained its current name in 2004. It represents companies that provide professional engineering expertise in delivering, maintaining and upgrading economic and social infrastructure across the UK. The Civil Engineering Contractors Association (CECA) was established in 1996 to represent the interests of the UK's civil engineering contractors who deliver, upgrade and maintain the country's infrastructure. These two organisations are jointly responsible for publishing the suite of Infrastructure Conditions of Contracts (ICC), which are largely based on the Institution of Civil Engineers (ICE) Conditions of Contract.

ICC Measurement Version 2011

ICC Minor Works Version 2011

ICC Design and Construct Version 2018

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ICC Measurement Version 2011

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Infrastructure Conditions of Contract Measurement Version (August 2011)

The Infrastructure Conditions of Contract Measurement Version is based on the traditional pattern of engineer-designed works, with the contractor engaged to build the works and with valuation by measurement. The form is not appropriate for lump sum contracts and assumes that a full design is provided to the contractor. There is provision for the employer to nominate subcontractors. The contract supports an ethos of collaborative teamwork and incorporates an early warning procedure for circumstances that could result in additional time or cost requirements.

Background

The Infrastructure Conditions of Contract (ICC) are based on the ICE Conditions of Contract, which they replaced in 2011. The Association for Consultancy and Engineering (ACE) and the Civil Engineering Contractors Association (CECA) jointly sponsor the ICC. The review and updating of the contracts under this family are undertaken by the Infrastructure Conditions of Contract Development Forum, which comprises representatives from the two sponsoring associations, employer representatives and legal experts.

Structure

The document is over 70 pages long and comprises: the conditions of contract; a form of tender with an appendix in two parts, the first of which is to be completed prior to tendering with the second to be completed by the contractor; and a form of agreement. The latter identifies the documents which form part of the contract and may include drawings, the specification and the priced bill of quantities in addition to the conditions. Also included is a form of default bond and contract price fluctuation clauses applicable to civil engineering work and structural steelwork. The conditions are contained in 72 clauses and the contract's table of contents and a particularly detailed index make referencing relatively straightforward.

Use

The form of agreement identifies the contract documents and entries in the appendix to the tender cover such matters as the commencement date, contract period, completion by sections, liquidated damages, payment and retention, insurance requirements, etc.

The key person for contract administration is 'the Engineer', who must be named and, in the event that the engineer is unable to act, the employer is obliged to nominate a successor.

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Synopsis

1 Roles

- The Parties to the Contract are the Employer and the Contractor. An Engineer is identified in the recitals and plays a key role in issuing instructions, certificates, etc. The duties and authority of the Engineer, the Engineer's Representative and named assistants are all clearly defined (2).
- The Contractor undertakes to construct and complete the Works as specified in or inferred from the Contract (8). The definition of 'the Works' includes both temporary and permanent works.
- The Contractor is responsible for all site operations and methods, but not for the design of permanent works (unless expressly provided in the Contract), or for the design of temporary and permanent works designed by the Engineer. Any design responsibility of the Contractor is limited to using reasonable skill, care and diligence (8).
- The Contractor is to work in strict accordance with the Contract and to the satisfaction of the Engineer. The Contractor is to comply with and adhere strictly to the Engineer's instructions on any matter whether mentioned in the Contract or not (13).
- The Contractor is obliged to give all notices and pay all fees required by legislation. These might relate to temporary works. If the Engineer certifies it, then the Contractor will receive repayment of all sums involved (26).
- While the Contractor indemnifies the Employer against the consequences of any breach of statutory obligations, this will not apply if the situation arises because of compliance with instructions given by the Engineer. There is no express obligation on the Contractor to check whether documents or instructions issued by the Engineer conform to statutory requirements, but if they are found not to, the Engineer must issue instructions (26).
- The Employer is obliged to make appointments in compliance with the CDM Regulations (71).
- The Contractor is prevented from assigning the Contract or any benefit or interest under it without the written consent of the Employer (3).
- The Contractor may not sub-contract the whole of the Works without the written consent of the Employer. Sub-contracting of any part of the work or design is permitted on condition that a written notice is given to the Engineer indicating the extent of work to be sub-contracted and the details of the sub-contractor not later than 14 days prior to the sub-contractor's entry to the site (4).
- Sub-contractors may be nominated, although the Contractor is given the right of objection (59). There is a detailed set of provisions for dealing with nomination and,

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as is normal, the Employer is required to bear some of the risk where defaults occur. If any design obligation rests with the sub-contractor, then this must be stated in the Contract and the sub-contract (58.3).

- Rights of third parties under the Contracts (Rights of Third Parties) Act 1999 are specifically excluded (3.2).

2 Documents

- A list of definitions is included (1).
- Special conditions can be incorporated and should be numbered consecutively as a continuation (72).
- The 'Agreement' comprises the Tender and written acceptance of it, drawings, the ICC Conditions of Contract, Specification and priced bill of quantities. The documents are to be taken as mutually explanatory and, in the event of ambiguities or inconsistencies, the Engineer shall explain and resolve the same and may issue appropriate instructions in writing (5).

3 Control: time

- The Contract may prescribe that possession of the site is to be given to the Contractor in portions (42).
- Matters relating to possession of the site and site access, beyond those prescribed in the Contract, are largely the Contractor's responsibility (42).
- The Contractor is to commence as soon as possible after the Works Commencement Date as stated in the Appendix to the Form of Tender, or within 28 days after the Contract is entered into, or at a date agreed between the parties. The Contractor is then to proceed with expedition (41).
- The time for completion is to be stated in the Appendix to the Form of Tender. Completion by Sections may be required (43).
- The Contractor is required to submit a programme for approval by the Engineer, and to revise it within 21 days if the Engineer so instructs (14).
- Interim extensions of time may be awarded. The Contractor must inform the Engineer, within 28 days, of the cause of the delay and supply detailed particulars. The Engineer must respond to all claims upon receipt of particulars and may award an extension in the absence of a claim. The overall extension of time awarded is subject to final review after completion (44).
- Where the Engineer thinks that progress is too slow and no extension of time is possible, written notice can be given to the Contractor to expedite matters. The Contractor will not be entitled to additional payment for taking such steps as may be necessary (46).

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- The Employer will be entitled to liquidated damages if the Contractor does not complete on time (47).
- The Engineer will issue a Certificate of Substantial Completion when the whole of the Works are substantially completed and have passed any final tests required by the Contract (48).
- The outstanding work and defects correction period runs from the date of substantial completion and is referred to in the Appendix to the Tender as the Defects Correction Period. The Contractor is obliged to finish any outstanding work, to deal with repairs, amendment, reconstruction, rectification and making good of defects either within the period or as soon as may be practicable. A Defects Correction Certificate is to be issued by the Engineer when he or she is satisfied, although this in no way relieves the Contractor of any liability (61).

4 Control: quality

- All materials and workmanship shall be as described in the Contract, and as instructed by the Engineer. There is provision for testing and taking of samples (36).
- The Contract allows for further drawings, Specifications and instructions to be supplied by the Engineer from time to time, as necessary (7).
- The Engineer is to have access to the Works, the site and workshops (37).
- Facilities must be afforded by the Contractor for work which is not in the Contract but ancillary to the Works, to be undertaken by other contractors employed by the Employer (31).
- The Engineer can require the removal of Contractor's employees (16).
- There are provisions to deal with the discovery of fossils, antiquities, things of archaeological interest, etc (32).
- No equipment owned by the Contractor is to be removed from the site without the written consent of the Engineer, and such consent is not to be unreasonably withheld (54).
- The Contractor is wholly responsible for the accurate setting out of the Works and, unless incorrect information was given by the Engineer, must rectify any error at its own cost (17).
- The Engineer is empowered to suspend any part of the Works (40) and to order variations, subject to their being of the type defined in the Contract (51).
- The Contractor is obliged to give the Engineer a reasonable opportunity to inspect work before it is covered up (38).
- The Engineer is empowered to instruct the removal from the site of any materials not in accordance with the Contract and the proper re-execution of work (39).

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- The Contractor is obliged to provide necessary superintendence and a competent agent or representative must be constantly on site (15).

5 Control: cost

- Because this is a measurement rather than a lump sum contract, there is reference to a 'Tender Total' (ie the total of the priced bill of quantities or estimated total value of the works) and a 'Contract Price' (ie sums to be ascertained and paid in accordance with the Contract) (1.1(j)).
- VAT will not have been included in the Tender and will be additional to the Tender Total (70.1).
- Provisional Sums and Prime Cost items are both defined (1.1), and work or goods which are the subject of Provisional Sums and Prime Cost items may be ordered by the Engineer (58).
- The quantities in the priced bill are estimated only and remeasurement will establish the actual quantities (55).
- The Contractor is expected to inspect and examine the site and its surroundings before tendering. The rates and prices tendered will be in the bill of quantities, and only if matters which could not have reasonably been foreseen are encountered is additional payment possible (11 and 12).
- Variations may be ordered by the Engineer (51). Wherever possible, quotations should be agreed in advance of the order. Otherwise, variations are valued at the rates in the Contract, if applicable, or otherwise at rates fixed by the Engineer, as the Engineer considers reasonable (52). Daywork is to be used as a basis for pricing the variation if the Engineer thinks it necessary or desirable, and the rates will be as set out in the daywork schedule included in the Contract (56.4).
- Payment is on the basis of a monthly statement submitted to the Engineer (60.1). The Engineer must issue a certificate within 25 days of receipt of a statement. Amounts for nominated sub-contractors are listed separately. The certificate must show the amount due and the basis for its calculation. If the Employer intends to pay less than the amount stated on the certificate, it must notify the Contractor not less than one day before the final date for payment, and state the sum that the Employer considers to be due and the basis for its calculation. The final date for payment by the Employer is 28 days after delivery of the Contractor's monthly statement to the Engineer. If the Engineer fails to issue a certificate as provided for in the Contract, the Contractor's monthly statement given under clause 60(1) becomes a payment notice or, where the Contractor has not submitted a monthly statement, then the Contractor may at any time give the Employer a notice, with a copy to the Engineer, of the sum the Contractor considers due at the relevant payment date and the basis for the calculation of that amount.

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- Where the Employer fails to make proper payment on time, then the Contractor is entitled to interest on the overdue amount (60).
- The rate of retention and the limit of retention will be as entered in Part 1 of the Appendix (60.5).
- Half of the retention is released within 14 days of the issue of the Certificate of Substantial Completion and the other half within 14 days of the end of the Defects Correction Period (60.6).
- Not later than three months after the date of the Defects Correction Certificate, the Contractor is required to give the Engineer a final account and supporting documents. The Engineer then has up to three months to issue the Final Certificate, which states the amount due. Payment is required within 28 days of certification (60.4).

6 Insurance

- The Contractor is to take full responsibility for the care of the Works and materials for incorporation, from the date of commencement until the Engineer has issued the Certificate of Substantial Completion. The Contractor's liability includes damage from any cause whatsoever, except where the damage is due to the Employer, or is a defined Excepted Risk or is due to faulty design of the permanent works (20).
- The Contractor is to insure in joint names against the risk of damage to the Works for the full replacement cost plus an additional 10 per cent. The policies are subject to approval by the Employer before the Works Commencement Date, and it may be prudent for the Employer to state the kind of cover required at tender stage (21).
- The Contractor indemnifies the Employer against all losses and claims arising from death or injury to any person, and damage to property other than the Works. There are certain stated exceptions (22).
- The Contractor is required to carry insurance against many of the risks in respect of which the Employer has been indemnified (23).
- The Contractor's obligations concerning the safety of employees on site is reinforced and the Employer is indemnified in respect of any claims (24).

7 Termination

- The Employer is given the right to terminate the employment of the Contractor in the event of the Contractor's insolvency or because of specified defaults by the Contractor. The Employer is entitled to take possession of the site, have the work completed and postpone any settlement of accounts until the Defects Correction Period has expired (65).
- The Contractor is given the right to terminate its own employment for specified defaults by the Employer or if the Employer becomes insolvent (64).

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- The rights and obligations of the Parties on the outbreak of war are fully stated (63).
- Termination of nominated sub-contracts is dealt with separately (59).

8 Dispute avoidance and resolution

- As soon as either Party becomes aware of any circumstance that, if not resolved, shall become a dispute, it shall notify the other Party, with a copy of the notice to the Engineer. No later than seven days after such notice and at the earliest possible time, the Parties shall meet with the aim of resolving the issue. The Engineer may be invited to the meeting. If the Parties fail to reach an agreement within a reasonable time, they are expected to set out in writing the areas still in dispute (66).
- The Contract sets out clauses 66A, 66B and 66C as alternative/complementary dispute resolution procedures.
- Clause 66A provides the Parties with the option, by agreement, to seek resolution of a dispute under the appropriate ICE dispute resolution procedure (66A).
- Since Part II of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) came into force, Parties to the Contract have the right to refer any dispute to adjudication at any time. Therefore, notwithstanding the provisions of clause 66 or 66A, either Party is entitled to refer a dispute to adjudication. The Conditions envisage that a notice of adjudication is to be given and that adjudication is to be conducted in accordance with the current ICE Adjudication Procedure (66B).
- All disputes may be finally determined by reference to arbitration (other than disputes relating to giving effect to the decisions of an adjudicator). The Party seeking arbitration must serve a notice to refer the dispute. The Arbitration Act 1996 is to apply and arbitration is to be conducted in accordance with either the current ICE Arbitration Procedure or the Construction Industry Model Arbitration Rules (66C).

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ICC Measurement Version 2011

This contract?

If considering using the ICC Measurement Version 2011, the following points should be borne in mind.

This contract is best suited to major civil engineering works, let on the basis of measurement.

The form is for use under the law of England and Wales and may also be adapted for use in Northern Ireland and under Scots law. If the law of the contract is that of Scotland or Northern Ireland, then clause 67(1), (2) and/or (3) shall apply. If used outside Great Britain and Northern Ireland, the contract is to be construed and interpreted in accordance with the local laws of the relevant jurisdiction.

The conditions are comprehensive and relatively flexible (ie with regard to commencement and completion, nomination of subcontractors, valuation of variations and design by the contractor).

Requirements for completing the form are confined to entries in those documents which follow the conditions, in particular the appendix to the tender and the form of agreement.

Parties are also expected to use the 'Special Conditions' to include particular arrangements specific to their projects.

Amendment of the conditions themselves is discouraged because changes in one clause may affect the balance of risks in other related clauses.

In terms of contract administration, the engineer is given greater authority than is usually the case with contract administration under building contracts.

The contract continues the ICE forms' traditional self-contained approach, without the need for supplements.

References and further reading

ICC Measurement Version (August 2011)
ICC Measurement Version Guidance Notes (August 2011)

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ICC Minor Works Version 2011

Association for Consultancy and Engineering and
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Infrastructure Conditions of Contract Minor Works Version (August 2011)

The Infrastructure Conditions of Contract Minor Works Version is intended for straightforward and simple projects, where the design of the works is provided by the engineer appointed to administer the contract. The contract can be used on a lump sum pricing basis, or on a measurement or cost reimbursement basis. There is no provision for nominated subcontractors, although the guidance notes suggest that approved subcontractors may be listed in the specification.

Background

The Infrastructure Conditions of Contract for Minor Works Version is sponsored by the Association for Consultancy and Engineering (ACE) and the Civil Engineering Contractors Association (CECA).

Structure

The form is about 20 pages long and includes conditions, an appendix and a form of agreement. The conditions are set out in sections under 15 headings and are commendably clear and easy to read. They are prefaced by a full index and helpful guidance notes. An October 2011 update brought the contract's terms into compliance with the amendments to the Housing Grants, Construction and Regeneration Act 1996 (HGCRA).

Use

This contract is suitable for use where the risks are small, the contract period is not expected to exceed six months, there are no nominations, design of the works is essentially complete at the point of inviting tenders, the contractor has no responsibility for design of the permanent works except for works of a specialist nature, and the contract value does not exceed £500,000. It is a form that is best suited to straightforward and simple jobs.

The form is suitable for lump sum contracts, for measurement contracts using a priced bill of quantities, valuation based on a schedule of rates or a daywork schedule, or as a cost reimbursement form. An appendix entry will show which is applicable.

The employer is required to appoint an engineer to administer the terms of the contract. The form also provides for the appointment of a planning supervisor. A starting date is to be entered in the appendix, together with a date for completion. Completion of the works can be in phases.

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ICC Minor Works Version 2011

Synopsis

1 Roles

- The Contract is between the Employer and the Contractor. The Employer must appoint an Engineer, who is to be named in the Appendix (2.1).
- The Engineer may appoint a named Resident Engineer, and delegate any powers except those dealing with certain matters including suspension of work and determination of whether a particular event deserves an extension of time on the grounds of being unforeseeable, among a few others (2.2).
- The Contractor undertakes to perform and complete the Works (3.2). It assumes full responsibility for the care of the Works from commencement until 14 days after the issue of the practical completion certificate (3.3).
- The Contractor is liable for design only where expressly stated in the Contract, and in respect of temporary works other than those designed by the Engineer (3.9). The standard expected is that of all reasonable skill, care and diligence.
- The Contractor is required to comply with all relevant statutory obligations, give all notices required and pay all fees and charges (9.1).
- Responsibility for any consent, approval, licence or permission for permanent works rests with the Employer. This would include planning consent and also, presumably, matters of land law, including party wall consents (9.2). The Contractor's liability does not extend to contravention of statutory requirements where this has occurred because instructions from the Engineer have been followed (9.3).
- Unless stated otherwise, the Engineer is to act as Planning Supervisor and the Contractor as Principal Contractor under the CDM Regulations (13).
- Other persons engaged directly by the Employer are to be given reasonable access to facilities on site (3.11).
- The Contractor cannot assign the Contract or any rights under it without the written consent of the Employer (8.1). Equally, the Employer requires the Contractor's written consent for any assignment.
- The Contractor may not sub-contract any part of the Works without the consent of the Engineer (8.2).
- There is no reference to nominated sub-contractors or suppliers, but the Guidance Notes suggest that approved sub-contractors and suppliers can be named and listed by the Engineer in the Specification.

2 Documents

- The Contract comprises the Contractor's Tender, the Conditions of Contract, the Appendix to the Conditions of Contract, drawings, Specification, the alternative

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options of a priced bill of quantities, Schedules of Rates or Daywork Schedules, and other documents listed under 'extra documents' in the Form of Agreement (Article 3).

- Definitions are included as part of the Conditions of Contract (1).
- Rights of third party rights under the Contracts (Rights of Third Parties) Act 1999 are specifically excluded (8.1).

3 Control: time

- The starting date is entered in the Appendix or, if it is not, then the Engineer must give written instructions within 28 days after acceptance of the tender (4.1).
- The contract period will be stated in the Appendix (4.2).
- If required, the Contractor must provide a programme within 14 days of the starting date (4.3).
- An extension of time may be granted where progress is delayed for reasons stated in the Conditions (4.4). The Contractor is expected to take all reasonable steps to avoid or minimise the delay.
- Substantial Completion occurs when the Works are fit to be taken into use or possession by the Employer. The Engineer is to certify Substantial Completion, or must advise the Contractor in writing of what remains to be done to achieve it. Partial possession is possible (4.5), as is completion by Sections identified in the Appendix.
- Liquidated damages will be payable where the Contractor fails to complete on time (4.6).
- A Defects Correction Period follows practical completion. The duration of this will be stated in the Appendix (5.1).
- Completion is to be certified by the Engineer after the defects have been made good and the Defects Correction Period has expired. Certification is in response to a request by the Contractor and shows that the contractual obligations have been discharged to the Engineer's satisfaction (5.3).

4 Control: quality

- The Engineer must provide any necessary instructions, drawings or other information (3.8).
- Instructions which the Engineer is empowered to issue are listed. These include variations, testing, suspension of work, removal of work not in accordance with the Contract and exclusion of persons (2.3).
- Each of the Parties is bound by every instruction or decision of the Engineer, unless it concerns a matter referred for dispute resolution (2.7).

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- The Contractor accepts full responsibility for setting out and for the stability and safety of its operations and methods (3.7).
- The Contractor is to notify the Engineer concerning the identity of the person who is authorised to receive instructions (3.6).

5 Control: cost

- More than one basis of payment can be used on any one Contract. The Appendix requires the deletion of methods that are not used. Options are for lump sum, measurement according to a priced bill, valuation on a Schedule of Rates, valuation on a Daywork Schedule and cost reimbursement.
- VAT is not included in the tender figure.
- The Contractor may be entitled to additional payments due to unforeseeable adverse conditions (3.10) or because of delay or disruption to progress (6.1).
- The Contractor is to submit a monthly statement giving the value of work executed and materials or other items to be included (7.2).
- The Engineer is to issue an Interim Certificate within 25 days of delivery of the monthly statement (7.3). The Appendix may include a minimum figure for any Interim Certificate. Every Certificate shall show the amount due and the basis on which it was calculated. Payment by the Employer becomes due on certification, with a final date for payment 28 days after delivery of the monthly statement. If the Employer intends to pay less than the amount stated in the certificate, it must notify the Contractor not less than one day before the final date for payment, stating the sum it considers to be due on the date the notice is served and the basis on which the sum is calculated (7.8).
- Where the Engineer fails to issue an interim certificate as provided for under this Contract, the Contractor's monthly statement will become a payment notice (7.2). Where the Contractor has not served a monthly notice, the Contractor may at any time issue a payment notice to the Employer, with a copy to the Engineer, stating the sum that it considers to be due and basis for calculation of that sum.
- In such cases, the final date for payment shall be postponed by the same number of days after the due date that the Contractor issued the payment notice (7.7).
- Within 28 days after the Engineer has certified completion, following the making good of any outstanding work at the expiry of the Defects Correction Period, the Contractor shall submit a final account. Within 42 days of receipt of this, the Engineer should issue the Final Certificate. The amount payable is due upon certification, and the final date for payment is 14 days later (7.4).
- Interest may be added to overdue payments (7.6).

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6 Insurance

- If insurance of the Works is to be the responsibility of the Contractor, an Appendix entry is required. The Contractor is then obliged to take out joint names insurance in respect of both temporary and permanent works. Unfixed materials and construction plant are included. Cover is for full value against all loss or damage, with the exception of Excepted Risks, as defined in the Contract Conditions (10.1).
- The Contractor gives the Employer an indemnity against loss and claims for injury or damage to persons and property. This liability will be reduced proportionately to the extent that the Employer, or those for whom the Employer is legally responsible, contributed to the cause (10.2).
- There are further exceptions to the Contractor's liability for matters beyond its control and in respect of which it does not indemnify the Employer (10.4).
- Insurance required under the Contract is subject to approval by the Employer (10.6).

7 Termination

- There is provision for termination where circumstances outside the control of the Parties render it impossible or illegal for either Party to fulfil its obligations under the Contract. In such circumstances, the work will be deemed abandoned on the service of a notice by one Party to the other (14.1).
- The Employer may also at any time by written order (Termination Order) require the Contractor to cease work (termination for convenience) (14.2).
- Either Party may terminate on the insolvency of the other, refusal of the other Party to perform its obligations and unauthorised assignment. Termination is by seven days' notice in writing to the defaulting Party.
- On abandonment or termination, the Engineer in preparing the Final Certificate shall consider the amount due to the Contractor for work actually done and the value of any unused or partially used materials and goods under the control of the Employer. Additionally, where the Employer has terminated for convenience, cost reasonably incurred or committed by the Contractor in expectation of completing the Works, including a reasonable percentage allowed for profit, is to be included in the payment certification.

8 Dispute avoidance and resolution

- As soon as either Party becomes aware of any circumstance that, if not resolved, shall become a dispute, it shall notify the other Party, with a copy of the notice to the Engineer. No later than seven days after such notice and at the earliest possible time, the Parties shall meet with the aim of resolving the issue. The Engineer may be invited to the meeting. If the Parties fail to reach an agreement within a reasonable time, they are expected to set out in writing the areas still in dispute (11).

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ICC Minor Works Version 2011

- The Contract sets out options for alternative dispute resolution under the appropriate ICE procedures.
- Either Party is entitled to refer a dispute to adjudication. The Conditions envisage that a notice of adjudication is to be given and adjudication is to be conducted in accordance with the ICE Adjudication Procedure (1997) (66B).
- All disputes, other than failure to give effect to an adjudicator's determination, shall be finally determined by reference to arbitration. The Party seeking arbitration must serve a notice to refer. The Arbitration Act 1996 is to apply and arbitration is to be conducted in accordance with either the ICE Arbitration Procedure (1997) or the Construction Industry Model Arbitration Rules (66C).

This contract?

If considering using the ICC Minor Works Version 2011, the following points should be borne in mind.

It is intended primarily for minor engineering works of short duration with a value not exceeding £500,000. It is for lump sum contracts, with or without a bill of quantities, or for measurement contracts. The employer is required to appoint an engineer to be the contract administrator. The contract is for use under the law of England and Wales and is suitable for use in Northern Ireland or under Scots law as provided for in clause 12.

It is a short but balanced form, which allows for phased completion. The conditions are succinctly and clearly worded.

Subcontractors may be listed in the specification.

Completing the form is straightforward, with entries required in the agreement and the appendix.

Contract administration should not be demanding, as the engineer is given considerable authority and the procedures are straightforward.

This is an accessible and user friendly form for low-risk projects.

References and further reading

ICC Minor Works Version (August 2011)

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Association for Consultancy and Engineering and
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ICC Design and Construct Version (June 2018)

The Infrastructure Conditions of Contract Design and Construct Version is intended for design-build procurement, where the contractor takes full responsibility for the design of the works, with the exception of any design provided by the employer. A contract administrator must be appointed (the 'Engineer), who is required to act impartially and to decide any disputes that arise. The contract provides for nomination of subcontractors by naming in the specification or by an instruction of the engineer. Payment is by certificates issued by the engineer. There are optional provisions for payment on achievement of milestones, for a sustainability policy and for employer-furnished materials.

Background

In the early 1990s, government moved to adopt design-build as the basis for awarding contracts for road schemes costing up to £40 million. It was a further endorsement of the rapidly growing popularity of this method of procurement and the belief that it would provide a greater incentive to complete schemes more quickly and save money overall – even if the up-front costs proved to be higher.

The ICC Design and Construct Version 2018 has its origins in the ICE Design and Construct Contract, which was first introduced in 1992. This contract envisaged lump sum payment, although other forms of payment or combinations of methods were also available.

A new version was published in 2014, which included some significant revisions, such as replacing the role of the 'Employer's Representative' with that of the 'Engineer'. The current 2018 version is more concise, is easy to follow, accommodates building information modelling (BIM) in a flexible way, provides for the use of early warning measures and encourages collaborative working practices.

Structure

The document is 65 pages long and includes the conditions, a form of tender with a three-part appendix, a form of agreement, a form of default bond and fluctuation clauses.

Contractor's design obligations are applicable to both permanent and temporary works. The completed form of agreement will show which documents are intended to be part of the contract. Among these, the employer's requirements and the contractor's submission are essential documents.

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ICC Design and Construct Version 2018

The conditions of the contract are in 20 main clauses and three supplementary clauses. The contents list and index on a clause-by-clause basis are particularly helpful.

Use

Entries in part 1 of the form of tender appendix will show contractors engaging in the tendering process whether a performance bond or other security is required, and provide detailed information, such as the commencement date, time for completion, completion by sections, damages, payment provisions, CDM responsibilities and arbitration procedures. Part 2 of the appendix will be completed by the tenderer.

Part 3 of the appendix sets out optional clauses, which relate specifically to use in the UK, such as clauses relating to the CDM Regulations and to VAT.

The key person in terms of contract administration is the engineer, who is to be named in part 1 of the appendix and who is given considerable authority to act within the terms of the contract. In the event of the engineer's departure, the employer must nominate a replacement.

Synopsis

1 Roles

- The parties to the Contract are the Employer and the Contractor. The Employer is required to appoint an Engineer and must notify the Contractor in writing of the Engineer's identity. If the Engineer is identified in the appendix, the Employer may replace the Engineer, but must notify the Contractor (5.1). The functions and authority of the named Engineer and the Engineer's named assistants are clearly defined under the Contract. The Engineer is required to act impartially (5.4). The Engineer's details are also entered in the Appendix.
- The Contractor undertakes to design, construct and complete the Works, including providing all design services, labour and materials, in accordance with the Contract and to the satisfaction of the Engineer (6.2). The Contractor is responsible for the design of the Works, except to the extent that any design is provided by the Employer or the Engineer (6.3).
- The Contractor's design is required to comply with the Employer's Requirements and with any Contractor's Proposals accepted prior to the start of the Contract (4.8a). This appears to be a strict liability.
- In all design obligations, the Contractor must exercise all reasonable skill, care and diligence (6.4).
- The Contractor may not sub-contract any part of the Works unless it first obtains the consent of the Engineer. Any sub-contracting without consent is deemed to be of no effect (3.3).

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- The Contractor must first obtain consent from the Engineer before appointing any new designers or changing any of the Contractor's Designers named in the Appendix to the Contract (3.4).
- The contract provides for the Employer to nominate sub-contractors, who may be listed in the Specification or instructed by the Engineer (7.1). The Contractor has a right of objection on the basis of grounds set out in the contract (7.2). It appears that once a nominated sub-contractor is appointed, the Contractor is fully responsible for its performance (for example, delay by a nominated sub-contractor is not a ground for an extension of time).
- Neither party may assign the Contract or any benefit or interest under it without the written consent of the other (3.1).
- Rights of third parties conferred by any law or statute are specifically excluded, to the extent that the relevant law permits (3.2).

2 Documents

- 'Contract' is defined as the Conditions of Contract, together with the Appendix, the Works Data, the Bill of Quantities, the Form of Tender, the acceptance of it, the form of Agreement and any supplementary clauses that are incorporated (1.1(c)).
- The Conditions include a full set of definitions (1).
- The documents taken together are stated to be mutually explanatory. Any ambiguities or inconsistencies are to be explained and resolved by the Engineer, who will issue appropriate instructions where necessary (4.1).
- Neither party has the right to assign the Contract or any benefit under it without the written agreement of the other (3.1).
- Rights of third parties under the Contracts (Rights of Third Parties) Act 1999 are specifically excluded (3.2).

3 Control: time

- The Commencement Date is the date notified by the Engineer to the Contractor, or such other dates as are agreed by the parties (10.1).
- The Contractor must start as soon as reasonably practicable after the Commencement Date, and proceed with due expedition and without delay (10.1).
- The Contract may prescribe that possession of the Site will be in portions, and also determine the order of availability and order of the Works.
- Unless any agreement has been made otherwise, the Employer must give the Contractor full possession of the Site (10.2).

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- Within 14 days of the award of the Contract, the Contractor must submit a programme to the Engineer, showing a critical path network. Where the Engineer objects to the original programme submitted by the Contractor, a revised programme is to be submitted within such time as is directed by the Engineer (9.1).
- Extensions of time may also be due where delay is caused by Excepted Risks (for example, occupation of the Site by the Employer, or errors in the design provided by the Employer), Employer's Risks (eg delay in giving possession of the Site, failure by the Engineer to issue necessary instructions) or Shared Risks (eg weather or special circumstances of any kind) (9.4).
- The Contractor is deemed to have inspected and examined the Site and surroundings, and to have obtained all necessary information relating to the Site before tendering. If the Contractor considers that further site investigations are necessary in relation to its design, it is required to notify the Employer of this in its tender (4.5).
- The Contractor should notify the Engineer within 28 days of becoming aware of the facts relating to a delay and supply necessary particulars (13.1).
- The Engineer is expected to consider all circumstances relating to the delay and, where it determines that the Contractor's submission is fair, grant an extension of time for Sectional or Substantial Completion of the Works and notify the Contractor and Employer of the extension and the reasons for granting it (9.6).
- The Engineer is required, not later than 14 days after the due date or extended date for completion of the Works, to award any extension of time that the Engineer considers to be due and to notify the Contractor and Employer of the extension and the reasons for granting it (9.7).
- If the Contractor fails to complete the whole or any designated Section of the Works to time, the Employer may deduct and retain liquidated damages. If any part of the Works achieves completion before the whole, then the liquidated damages are proportionally reduced (10.6).
- Where progress is too slow to ensure completion by the date agreed, the Contractor is obliged, if required by the Engineer, to take such steps as may be necessary, at its own expense, to achieve timely completion (10.11).
- The Contractor may agree to accelerate the Works, on terms agreed by the Engineer on behalf of the Employer (10.12).
- The Engineer must issue a Certificate of Substantial Completion when the whole or a designated Section of the Works is substantially complete. Substantial completion is stated to mean that all works are complete, except for any omission or defect that does not prevent use of the Works for their intended purpose (10.4).
- The Contractor is obliged to complete any outstanding work and deal with repairs during the Defects Correction Period (10.5). When the Engineer is satisfied, a Defects Correction Certificate is issued (10.4(c)).

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4 Control: quality

- The Works must be designed, constructed and completed in accordance with the Contract, and materials and workmanship must be as described in the Contract, or be in accordance with appropriate standards and codes of practice (6.2).
- The Contractor must submit all necessary design drawings to the Engineer, whose consent must be obtained before construction work is undertaken (4.8).
- The Contractor must provide all necessary superintendence (6.5).
- The Contractor is responsible for the safety of the design, and for stability and safety of all site operations and methods of construction (6.6).
- The Engineer may order suspension of any part of the Works and order alterations to the Employer's Requirements (5.7(a)).
- The Engineer can require the testing of any works, the cost of which is borne by the Contractor if included in the Contract or if the tests show the work to be defective (5.7(b)).
- The Engineer may instruct the removal from the site of any work and materials which do not comply with the Contract, and the removal and replacement of materials and workmanship. This will extend to replacement of work for which the Contractor has design responsibility (5.7(c)).

5 Control: cost

- The Form of Tender includes for a lump sum, or such other sum as may be ascertained in accordance with the Contract Conditions. The contract price will include for the design, construction and completion of the Works. Within 28 days of the award of the Contract, the Contractor is required to submit a Bill of Quantities in which the total shown is the same as the accepted Tender Total (11.1).
- The quantities stated in the Bill are deemed to be fixed, ie the work will not be subject to remeasurement (11.3).
- Variations to the Employer's Requirements may be instructed by the Engineer and, if requested, the Contractor must submit an estimate of the extra cost and delay involved (12.1 and 12.4). Otherwise, or if the estimate is not accepted, valuation of ordered variations will be by the Engineer in accordance with clause 12.6.
- Payment is on the basis of statements submitted at monthly intervals by the Contractor to the Engineer showing the amounts that the Contractor considers to be due (11.4).
- The Engineer must issue a certificate within 20 days of the statement. The certificate must show the amount due and the basis of calculation as set out in the Contract (11.5). Amounts due to nominated sub-contractors are to be shown separately in the certificate (7.3).

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ICC Design and Construct Version 2018

- Where the Contractor fails to issue a statement, the Engineer must nevertheless issue a certificate on the payment due date (11.5). The final date for payment by the Employer is ten days after the issue of the certificate by the Engineer.
- If the Employer intends to pay less than the amount stated on the certificate, it must notify the Contractor not less than five days before the final date for payment, stating the sum that the Employer considers to be due on the date the notice is served and the basis for its calculation (11.6).
- If the Engineer fails to issue a certificate as provided for in the Contract, or the Employer fails to make appropriate payment on time, the Contractor is entitled to payment of interest on the outstanding amount (11.9).
- The Employer is entitled to withhold, and the Engineer is entitled to remove, from the certified sum, retention amounts which the Engineer considers are necessary for remedying any defective or completing any outstanding work, and the amounts may be withheld until the work is rectified or completed (11.8). This retention is therefore limited to amounts that can be justified for patent defects; no amount is deducted for potential latent defects.
- Not later than six months after the issue of the Certificate of Substantial Completion, the Engineer must submit to the Contractor a statement of final account, together with supporting documentation (13.5). Not later than three months after the statement of final account, the Contractor must either agree the statement or explain the reasons for disagreement. The Engineer must then issue a Final Certificate within three months after the agreement or receipt of the Contractor's reasons, or the last Defects Correction Certificate, whichever is the later (13.7). The final date for payment by the Employer is within 28 days of certification (13.8).

6 Insurance

- The Contractor takes full responsibility for the care of the Works, materials, plant and equipment from Commencement Date to Substantial Completion. The risks include any loss or damage, with the exception of the Excepted Risks listed in the Contract Conditions (8.1 and 8.2).
- The Contractor must insure in joint names against risk of damage to both the temporary and permanent works for the full reinstatement cost, plus 10 per cent to cover additional costs (17.1).
- The Contractor indemnifies the Employer against the consequences of claims for injury to persons and damage to property other than the Works. There are stated exceptions, and these remain the responsibility of the Employer (17.3).
- The Contractor is required to cover the indemnity afforded the Employer by taking out third party insurance cover. The minimum cover required by the Contract will be the figure stated in the Appendix to the Form of Tender, but this will not necessarily be the extent of the Contractor's liability (17.7).

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- The Contractor's obligations concerning accident or injury to work people is reinforced, and the Employer is indemnified in respect of claims (17.9).
- The Contractor is required to take out professional indemnity insurance as set out in the Appendix (17.10).

7 Termination

- The Employer may give the Contractor seven days' notice in the event of specified defaults, which include insolvency, and after expiry of the notice may expel the Contractor from the Site without releasing it from any obligations under the Contract (15.2).
- Procedures for completing the Works, ascertaining the value of work already done and arranging for payments after termination are set out in the Contract (15.4–15.6).
- In the event of specified defaults on the part of the Employer, which include insolvency, the Contractor may terminate its own employment under the Contract, after serving seven days' notice and with all reasonable dispatch remove all equipment from the Site (15.8 and 15.9).
- If execution of the Contract is prevented by force majeure for a period of not less than 42 days, then either party, after giving 28 days' notice, may terminate the Contractor's employment (14.2).

8 Dispute avoidance and resolution

- The Employer, Contractor and Engineer are required to collaborate in a spirit of trust and mutual support. As soon as either the Contractor or Engineer becomes aware of any circumstance that, if not resolved, shall become a dispute, it is required to inform the other party. No later than seven days after such notice, and at the earliest possible time, they shall meet with the aim of resolving the issue. If they fail to reach an agreement within a reasonable time, the Engineer is to issue appropriate instructions (6.1).
- Any dispute between the parties is to be referred in writing to the Engineer, who gives a decision within 14 days (19.1). The Engineer is given a wide authority to decide any dispute arising out of or in connection to the Contract, ie it is not restricted to matters that the Engineer is to determine under other causes.
- The Engineer's decision under 19.1 is binding if neither party challenges it within 28 days (19.2).
- Clause 19.3 provides the parties with the option, by agreement, to seek resolution of a dispute under conciliation or mediation.

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- Either party has the right to refer any dispute to adjudication under the procedure selected in the Appendix (19.4). This referral can be at any time, whether or not the matter has been referred to the Engineer. The adjudicator's decision is binding unless written notice of arbitration is given within 28 days.
- All disputes may be finally determined by reference to arbitration, according to the arbitration procedure stated in the Appendix (19.6). The party seeking arbitration must serve a notice to refer.

This contract?

If considering using the ICC Design and Construct Version 2018, the following points should be borne in mind.

This form is intended for design and build by the contractor. It is primarily for use with civil engineering work. It is a lump sum contract with no provision for remeasurement. The employer is required to appoint an engineer to administer the contract.

The contract is for international use and the law of the contract must be identified. There are optional clauses which may be adopted when the form is used in the UK.

The key features are the employer's requirements and the contractor's submission. The onus is on the contractor to check design information supplied as part of the employer's requirements. Drawings originating from the contractor's designers must be approved by the engineer before work is commenced, but this in no way reduces the contractor's liability for its design.

References and further reading

ICC Design and Construct Version (June 2018)
ICC Design and Construct Version Guidance Notes (June 2018)

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Chartered Institute of Building

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In 1998, the Chartered Institute of Building (CIOB) published a Mini Form of Contract and, in 2013, it published the Complex Projects Contract (CPC 2013). CPC 2013 was considered to be the first standard form specifically aimed at time management in complex construction projects, and the first standard form to have building information modelling (BIM) incorporated within the form.

CIOB Time and Cost Management Contract 2015

CIOB Mini Form of Contract (General Use) 2014

CIOB Mini Form of Contract for Home Improvement Agencies 2014

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CIOB TCM15

Chartered Institute of Building

Time and Cost Management Contract 2015 (TCM15)

The CIOB's Time and Cost Management Contract (TCM15) is a flexible contract intended for large and complex projects. It allows for varying degrees of contractor design input (ranging from none to complete contractor design) and a wide variety of pricing mechanisms. The contract places a strong emphasis on the management of time and cost, and includes detailed clauses covering these issues, together with additional contractual roles including time manager, cost manager and a range of identified experts. The contract also includes more detailed provisions relating to BIM than other standard forms. It would be suitable for projects where timing issues are crucial and where the employer is prepared to invest in the necessary range of expert consultants needed to administer the contract effectively.

Background

TCM15 is a revised edition of what was previously the CIOB's Complex Projects Contract, published in 2013. The earlier version was intended 'to bring construction contracts into the 21st century' and included extensive clauses relating to the management of time and cost, which aimed to avoid disputes, along with detailed provisions covering BIM. Both these features were innovative and both have been retained in the current edition. Particularly notable are the provisions on the management of the programme, progress and dealing with timing issues, which run to eight pages.

There are relatively few changes between the two editions. The name was changed 'to reflect more clearly the core strengths of the Contract'. The clauses were reordered and there were some minor clarifications in the drafting, particularly in relation to the section on BIM, which now refers to a BIM protocol. A professional consultancy appointment and subcontract were added to the suite of documents.

Structure

The full TCM suite comprises nine documents, listed at the end of this section. As well as the construction contract there is a subcontract, a consultancy appointment and various schedules. The contract itself is made up of three documents: the contract agreement, the conditions and the contract appendices. The contract envisages that the parties would include project-specific matters that take precedence over general conditions in the special conditions.

The conditions of contract comprise 74 clauses, starting with definitions and interpretation and concluding with issue resolution and dispute resolution.

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The contractor and the employer are to appoint their representatives, who shall act with the full authority of either party on all matters relating to the contract. One difference between the TCM suite and the NEC or JCT contracts is that TCM15 requires a number of additional contractual roles, including time manager, data security manager and principal expert.

Use

According to the CIOB, TCM15 is recommended for major construction or civil engineering projects where the programme is too complex to be managed 'intuitively' and which require a more scientific approach to time and cost risk management than is usual.

The contract is for use with complex projects and the CIOB state that it can be used for:

- build only of a design prepared under the direction of the Employer
- build only of a design prepared under the direction of the Employer, but with the Contractor's design of parts
- design and build or turnkey projects in which the Contractor is responsible for both the design and construction of the Works
- construction management and management contracting (with some changes in terms required by Special Conditions).

It allows for a range of pricing options, including fixed price, target cost, measured term, fixed fee and cost reimbursement. It would also be possible to include alliancing arrangements, such as pain/gain mechanisms. The pricing arrangements are to be set out in the special conditions.

The contract refers to critical path network modelling, resource allocation and productivity analysis. CIOB's website explains that the 'Working Schedule is required to be in differing densities updated and revised on the rolling wave principle that constantly predicts the currently attainable completion date, sectional completion dates and key dates'. Cost management is 'by reference to the values attributed to the activities in the working schedule with progress updated from databased progress records. The updated working schedule constantly predicts the out-turn cost of the Works and the value of work done to date'. Clearly a significant level of expertise is required to successfully administer this contract, which is no doubt why there is a wider range of roles referred to in the terms, including a time manager and a cost manager.

Synopsis

1 Roles

- The parties to the Contract are the Employer and the Contractor.

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- The Contractor and the Employer are each required to identify an Authorised Representative in the Agreement, who shall be empowered to act with the party's authority in all matters relating to the Contract (6.1 and 6.3). If the Contractor's appointed person is unable to act, or the Contract Administrator makes reasonable objection to the appointed person, the Contractor is required to appoint another in its place. Similarly, the Employer must appoint an alternative if its agent proves unable to act.
- As well as the roles of Employer and Contractor, the contract refers to the Contract Administrator, Time Manager, Cost Manager and 'Listed Persons'. The Listed Persons are identified in Appendix B, together with their discipline (eg 'Mechanical Engineering'). All of these have specific duties under the contract, but generally give advice and information to the Contract Administrator, who issues all instructions, notices and certificates.
- Appendix B also requires the identification of a range of experts, and a Principal Expert, who play a role in first stage dispute resolution.
- The parties are required to cooperate in a spirit of mutual trust and fairness and in good faith (4.1) and the Contract Administrator, Time Manager, Cost Manager and/or any Listed Person must exercise discretion between the interests of the Employer and Contractor independently and fairly (4.2).
- The Contractor is required to exercise the level of skill, care and diligence to be expected of a properly qualified and competent Contractor experienced in performing the works for projects of a similar size, value and complexity to the Works (4.3). The Contractor is to ensure that it does not put the Employer in breach of any Connected Contracts (4.3.1).
- In relation to Contractor's Design, including any inspection and/or check, the Contractor is required to exercise 'the diligence, skill and care that is reasonably to be expected of a relevant professional practitioner experienced in the design of work of a similar size, value and complexity to the Works' (4.4). The Contractor is not responsible for errors in the Employer's requirements, unless required under the Applicable Law or Special Conditions (3.6).
- Any approval, acceptance or instructions issued by the Employer, Contract Administrator, Time Manager, Cost Manager or Listed Persons are stated not to relieve the Contractor of its obligation under the Contract (4.11).
- The Contractor is to comply with all applicable laws, including the laws of countries other than the country in which the site is situated, where an aspect of the work is carried out in that second country. Failure to comply will be a Contractor's risk, for which it shall indemnify the Employer against all expenses and loss, including third party action (4.5).

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- The Contractor is to maintain appropriate health and safety procedures on site, including keeping to local laws and appointing necessary personnel, who shall have the authority to give instructions on health and safety issues and keep records (22). Any incidents are to be reported to the Contract Administrator within one business day, failing which the Contract Administrator may require the Contractor to suspend performance of the Contract to allow for investigation (22.5). The cost of such suspension is to be borne by the Contractor.
- Unless stated otherwise in the Specification, the Contractor is not to subcontract the Works without the approval of the Contract Administrator, and such approval is not to be unreasonably withheld (29.2). Where the Specification states that certain work is to be carried out by a subcontractor selected from a list, and a list of at least three firms has been provided, the Contractor shall, at its sole discretion, select a subcontractor from the list (29.3).
- Irrespective of the appointment of subcontractors, the Contractor shall remain wholly responsible for carrying out and completing the Works (29.6). All subcontracts must be on the CIOB TCM Subcontract Agreement.
- Neither party may assign the whole or any part of the Contract without the other's consent, except in the case of monies due as security in favour of a bank (29.1).

2 Documents

- The Contract is defined as 'The Contract Agreement between the Employer and the Contractor to which the Conditions of Contract and Contract Appendices relate, including those documents listed in the Contract Agreement as Contract Documents'. The priority of contract documents is set out in clauses 3.3 and 3.4.
- The conditions represent the entire agreement between the parties and override any earlier communication or agreement (3.1). The Contract also provides for severability, therefore if any clause becomes inapplicable, the rest of the Contract will continue to have effect.
- Defined terms are capitalised terms which are used frequently throughout the Contract and have their meanings set out in Appendix A (1.1).
- The law applicable to the Contract is entered in the Contract Agreement (2.2) and the currency of payment entered in Appendix B (2.3). Clause 2.5 sets out rules for interpretation of the Contract and for the distribution of documents. An order of priority for discrepancies in dimensions in contract drawings is also set out (3.4).
- Detailed provisions regarding the methods of communication are set out in clause 7.
- Where the Contract requires any documents or information to be distributed or published, these must be sent to the Contract Administrator, the Time Manager and the Cost Manager. The Contract makes provisions for electronic communication and Common Data Environments where stakeholders may view communications (2.5.7, 2.5.8 and section 7).

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- The Contractor is expected to notify the Contract Administrator at the earliest possible opportunity of any inconsistency in the Contract Documents and/or between the Contract Documents and the applicable law (3.5).
- Within ten business days of the receipt of notification under clause 3.5, the Contract Administrator is to give instructions which shall be valued as a variation, except in cases where the inconsistency would be resolved by relying on the position under a higher priority document or where the inconsistency refers to the Contractor's design or any documents submitted by the Contractor (3.7).
- The Contractor is expected to have and retain all intellectual property rights on all design contained in the Contractor's Design portion of the Contract and to indemnify the Employer in the event of loss or expenses on account of the design infringing any third party intellectual property rights (14.1).
- The Contractor is expected to grant the Employer an irrevocable, non-exclusive and sub-licensable right to use the designs of the Contractor for all purposes connected to the Works, including facilities management and repairs and alteration of the Works, which may be carried out by another contractor (14.2).
- Where the Works are to be designed using BIM, the model shall be maintained according to an identified BIM Protocol (17.1.5 and Appendix B).
- Unless a contrary intention is expressed in the Contract Specification, the Building Information Model, and all drawings and information extracted from it, is owned by the Employer and the Contractor receives a licence to use the model for the purposes of carrying out the Works only (17.1.2).
- Where the Contractor is to make a Design Contribution, the contribution will be made according to the requirements of the BIM Protocol and Appendix B (17.2.2). The intellectual property rights of the contribution remain with the Contractor (17.3.1).
- The Contractor is expected to indemnify other design users against any liability (direct or consequential) arising from the Contractor's Design. In addition, the Contractor is expected to notify the Contract Administrator of any clashes or inconsistencies between the Contractor's Design and any other designer's contribution (17.2.2).
- Where the Contract Specification requires the Contractor to design the whole of the Works using BIM, the Contractor will retain copyright in the model. The Contractor will be expected to notify the Contract Administrator of the identity of the person appointed to manage the model, provide the Common Data Environment and remain entirely responsible for the suitability and integrity of the preferred software and of any information derived from the model. The Contractor shall maintain and update the model as required by the Contract Administrator and archive the model in accordance with the BIM Protocol (17.3.2).

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3 Control: time

- The Employer is to grant the Contractor access to and possession of the Site on the Access Date stated in Appendix B (5.1).
- The Contractor is required to commence the physical Works on Site on the Access Date, to proceed with the Works in a good and workmanlike manner and to complete the Works by the Date for Substantial Completion (5.2).
- Where it is stated in the Special Conditions that the Works are to be commenced and/or completed in sections, the Employer must give access to each section on the Sectional Access Dates and the Contractor is expected to commence work on the date that access is provided and complete on the Sectional Completion Date set out for each Section in Appendix B (5.4). Parts of the work stated to be completed by a key date are to be completed on that date (5.5).
- Progress Meetings are to be arranged by the Contract Administrator at agreed intervals and the Contractor, Time Manager and others must attend (30.1).
- The Contractor is required to publish a Working Schedule, prepared in accordance with the requirements of Appendix D and the recommendations of the CIOB Guide, which identifies the Contractor's intentions for the future conduct of the Works (37.1). Where the Contractor is undertaking design, the schedule shall incorporate the Design Execution Plan (37.4). The Contractor may not carry out any of the work shown until the schedule is accepted by the Time Manager (37.10).
- The Contractor is required to maintain progress records and submit these for the approval of the Time Manager (39).
- There are detailed provisions covering the updating, revision, publication and approval by the Time Manager of the Working Schedule (40 and 41).
- If at any time the Employer, Contract Administrator or Listed Persons become aware of any event likely to occur or occurring that will affect the progress of the Works, the person is to notify the Contractor of such event (34.1).
- The Contractor, on becoming aware of any such event (including those notified by other persons as detailed under clause 34.1), is required to send an Early Warning to the Contract Administrator and other listed persons, comprising a description of the Event and a 'Draft Impacted Working Schedule and Draft Impacted Planning Method Statement' (34.2).
- The Contract Administrator convenes a risk management meeting, following which the Contract Administrator updates the Risk Register, including identifying the new Data Date (35.1 and 35.2). The Contractor revises and publishes a new version of the Working Schedule, if necessary (35.4).

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- If it becomes aware that an Event is likely to occur, is occurring or has occurred, the Contractor is required to prepare a detailed description and assessment of the effect for each and every Event, including 'a logically linked Fragnet [fragment of a network diagram illustrating the sequence of activities]' prepared in accordance with Appendix D (43).
- If, on receiving the information referred to in clause 43, the Time Manager considers that the Event has occurred and is an Employer's Time Risk Event, and the information and estimates provided by the Contractor have been properly prepared, it informs the Contract Administrator of the impact and/or instructions that may be issued to reduce the impact. Within ten days, the Contract Administrator must extend the time for completion or issue instructions to reduce the time needed (51).
- There are detailed provisions for assessing the effect of float and concurrent delays (45 and 52), and for improving progress and acceleration (46–50).
- The Employer may occupy part of the Works prior to the issue of the Certificate of Substantial Completion, with the Contractor's consent (53.1).
- The Contractor notifies the Contract Administrator when it considers that the Works have achieved Substantial Completion. Unless the matter is referred for Issue Resolution under clause 54.3, the Contract Administrator is required to issue a Certificate of Substantial Completion within five business days of the notice.

4 Control: quality

- The Contractor is required to carry out the Works in a good and workmanlike manner and in accordance with the Contract (5.2).
- The Contractor must provide all labour, goods, materials and plant necessary for completing the Works to the standards set out in the Contract (24.3) and warrants that they 'are integrated, co-ordinated and compatible with one another and with the rest of the Works' (24.4).
- Where the Contract Administrator becomes aware that any person engaged by the Contractor is performing below standard or is not complying with health and safety rules or is damaging the environment, it shall bring the matter to the attention of the Contract Administrator. If the action complained of persists, the Contract Administrator is entitled to require the Contractor to exclude such person from the Works and, where necessary, require the appointment of a competent replacement (24.13).
- Unless otherwise stated in the Special Conditions or required under the Applicable Law, the Contractor is not expected to verify the accuracy of any design not produced by it (3.6).
- Where the Contractor is to design the whole of the Works, it must, within 20 days of the Start Date, issue a Design Execution Plan, which identifies the timing of submissions and any other matters required by the Contract (15.1).

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- The Contractor's Design is to comply with relevant standards and laws and be of good quality. Additionally, the work should incorporate the requirements and benefits of the design preceding it. The design is also expected to facilitate safe construction and be fit for the purpose required by the Contract. The design should include all works reasonably inferred from the Specification as well as design not referred to in the Specification but which is required to complete the Works or which is necessary for the Works to be fit for the purpose set out in the Contract (16.2).
- The Contractor is to ensure that there are no clashes, inconsistencies or ambiguities in its design or between its design and the design of other parts of the Works (16.3).
- Unless stated otherwise in the Specification or instructed by the Contract Administrator, the Contractor shall not commence any Design Stage unless the previous Design Stage has been approved (16.5).
- At the completion of each Design Stage, the approved design shall be signed by the parties, with a copy provided to the Contract Administrator (16.6). The Contractor will update the design when changes occur due to variations and to reflect the as-built information (16.7). The Contractor is expected to publish its designs at various intervals stated in the Contract and at the request of the Contract Administrator (16.8).
- Except in relation to the Contractor's Design for BIM, the Contract Administrator is expected to maintain a database of the Contractor's design submission with a copy of the database being published five business days before each Progress Meeting (16.9).
- The Contract Administrator is to issue all instructions required by the Contract. Instructions from the Contract Administrator may include such matters as Prime Cost/Provisional Costs expenditure or omission, suspension of the Contractor's obligation and any necessary instruction for safe, timely and cost-effective completion of the Works (31.1).
- The Contractor shall comply with all instructions given by the Contract Administrator within the time stated in such instruction and, in the absence of time stipulation, within a reasonable time (31.2). Where an instruction from the Contract Administrator will render the Contractor's Design in conflict with law and/or inconsistent with design of other parts, the Contractor is to notify the Contract Administrator, who is expected to amend, retract or affirm the instruction, after which the Contractor is to comply with it (31.3).
- Where the Employer provides the Contractor with information relating to the physical ground conditions, subsurface conditions or geology, it shall have the status assigned to it in the Contract Specification. Where no status is assigned, the Contractor is expected to rely on the information (11.2).

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- The Contractor is expected to notify the Employer of any further investigation of the Site required prior to commencing work and the Employer must provide the necessary information (11.4).
- Unless otherwise stated in the Contract or against local laws, goods and materials are to become part of the Works as soon as they are incorporated into the work or the value for them is added to the payment notice (whichever occurs first) (24.1).
- Where the Contract Specification requires that samples of goods and materials be supplied to the Contract Administrator for approval, the Contractor shall provide such samples along with all necessary technical information before incorporation into the Works (24.6).
- The Contractor is to carry out all tests and Completion Testing set out in the Contract Specification in the presence of the Contract Administrator and any other required persons (26.1). Where the Specification requires that the Contract Administrator be present at a test, the Contract Administrator will be notified five business days before the date of the test (26.3). The Contractor is to forward to the Contract Administrator duly certified reports and certificates of the tests; where the Contract Administrator is satisfied that the tests meet the standard required by the Specification, it is expected to sign the Contractor's certificate (26.5).
- Where the Contract Administrator is of the opinion that any work, goods, materials and/or Permanent Plant is defective, he or she may order its reopening and retesting, or its removal from site and replacement, and to the extent that any work, goods, materials and/or Permanent Plant are found to be defective, the Contractor must bear the costs of any replacement as well as the time and costs of the tests (26.9).
- Where the Contractor is not satisfied with the decision in clause 26.9, it may refer it for Issue Resolution within two business days; failing which it shall be deemed that the Contractor accepts the Contract Administrator's decision (26.10).

5 Control: cost

- The Contract can be let on any pricing basis, ie lump sum, measurement, prime cost, etc (User Notes).
- The Cost Manager is required to issue the Contract Administrator with a statement of the Current Contract Value, which is the 'Predicted Cost' minus the value of Activities not complete, or completed incorrectly, the cost of materials and goods delivered prematurely to Site, and the cost of unfixed goods in which the property cannot be passed to the Employer (61.1). The Predicted Cost is 'the total cost indicated against all the Activities and Levels of Effort in the latest accepted Working Schedule' adjusted to take account of variations, loss/expense, etc (60.1).
- The Penultimate Contract Value is the Current Contract Value calculated after the issue of the Certificate of Substantial Completion (62.1).

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- The Final Contract Value is the Current Contract Value calculated after the issue of the Certificate of Making Good Defects (63.1).
- The Contract Administrator is to issue a Notice of Payment Due to the Employer no later than the Notice Date (64.1). A Notice of Payment Due shall identify the final date for payment and the amount due to be paid (64.2). If the aggregate sum of the amount due exceeds the Predicted Cost, the Contract Administrator is to notify the parties of the amount due from the Contractor to the Employer (64.4).
- Where the Contract Administrator fails to issue a Notice of Payment Due by the Notice Date, the Contractor may issue a Notice of Payment Due to the Employer. The notice shall include the sum that the Contractor considers due, the basis of its calculation and the basis for claiming that the payment is due (65).
- Where the Contractor issues a Notice of Payment Due, the final date for payment shall be postponed by the number of days between the Notice Date and the date on which the Contractor issued such notice (66.2).
- Where the Notice of Payment Due requires the Employer to pay the Contractor, the Employer shall make payment, on or before the final payment date stated in Appendix B, to the Contractor of the amount notified in the Notice of Payment Due (66.3.1).
- Where it intends to pay a lesser sum, and unless contrary to local laws, the Employer shall notify the Contractor, no later than five business days prior to the final date for payment, of its intention to pay less and the basis for the calculation of that amount (66.3.2). Similar rules apply where the payment is due from the Contractor to the Employer (66.5).
- If the Employer is entitled to expenditure and/or loss, it may deduct this under a Notice of Payment Due, or by means of a 'pay less notice', or reclaim it as a debt (66.6).
- Where payment is not made in full by the final date for payment, the Contractor may suspend all or any of its obligations on the issuance of ten business days' notice, and until such time as full payment is made the Contractor shall not recommence the Works. The notice should identify the obligations that the Contractor intends to suspend (66.4).
- Parties are also entitled to interest on late payment at the rate stated in Appendix B (67).
- Prior to the issue of the Certificate of Substantial Completion, the Contract Administrator may instruct a Variation. As soon as reasonably practical after receiving such instruction, the Contractor is to provide a calculation of the time and cost effect (if any) of the Variation prepared in accordance with the Contract.
- The Contract provides detailed clauses for calculation of the effect of Events on time and costs (44).

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6 Insurance

- Each party is expected to take out and maintain insurances as stated in the Special Conditions (10.2).
- Each party may request to see evidence of the insurance that the Contract requires the other party to maintain. Where such evidence is not provided, the other party may take out the required insurance (10.3).
- The Contractor shall be liable for and indemnify the Employer against loss and expenses arising from personal injury or death during the course of the Works, except where the death or injury is due to an act or omission of the Employer or persons engaged by it. The same rule applies to injury and damage to real and personal property (10.4).

7 Termination

- The Employer is entitled to terminate for convenience on the issue of a notice to terminate to the Contractor not less than 20 business days before the Termination Date (68.1).
- Within 60 business days, the Cost Manager is to issue a statement of the current contract value and is to include the cost of items such as the removal from site of any Contractor's Plant and Temporary Work as listed in clause 68.2.
- The Employer may terminate the Contractor's employment immediately by notice in the event of the Contractor's insolvency (69.1).
- The Employer may terminate the Contractor's employment for Contractor default at any time before the issue of the Certificate of Substantial Completion for the Works. Contractor default may include failing to complete the work within any limit on the period of delay stated in Appendix B, refusal to comply with the Contract Administrator's instructions, failure to comply with the law, bribery and corruption and health and safety breaches (69.3).
- The Employer is to notify the Contractor within ten business days of the Contractor's Default, stating the nature of the breach, the date of its occurrence and action required to remedy the breach, if it is amenable to remedy (69.3). If the Contractor fails to remedy the default within ten business days, the Employer may give five business days' notice of termination to the Contractor, stating the Contract Termination Date (69.4).
- If the Employer considers that the breach is not capable of remedy, the Contractor may nevertheless propose a solution within five business days of the notice (69.5). The proposal may either be accepted or rejected or further information may be required.
- Where the Contractor fails to provide further information as requested or the proposal is rejected, the Employer may, by five business days' notice, terminate the Contract, stating the Contract Termination Date (69.6).

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- Where the Contractor's remedy is accepted for a specified default, if the Contractor repeats the default, the Employer may serve on the Contractor notice of termination identifying that the notice is issued under clause 69.7 and stating the Contract Termination Date (69.7).
- Where Termination is due to the default of the Contractor, the Contractor shall vacate the Site and the Employer shall take whatever steps are reasonably necessary to secure the Site (69.8).
- Within 100 business days of termination for Contractor's default, or 60 business days of the Substantial Completion of the Works, whichever is later, the Cost Manager shall issue the Contractor with a statement of the Penultimate Contract Value, which will include works properly completed at the Contract Termination Date, including the value of Temporary Work, etc, less the cost to the Employer of completing the Works (69.9). Within ten business days of the statement, the Contract Administrator shall issue a Notice of Payment Due (69.10).
- The Contractor may end its employment immediately by notice in the event of the Employer's insolvency (70.1).
- Termination may also be on account of an Employer's breach, including failure to make payment, interference with the issuance of certificates under the Contract and failure to comply with local laws on bribery and corruption and health and safety. On the occurrence of any of the issues listed as Employer's default, the Contractor shall, within ten business days, notify the Employer, setting out the nature of the default, date of occurrence and action required to remedy the default (70.2).
- If the Employer fails to remedy the default within ten business days of the notice, the Contractor may give five business days' notice of termination to the Employer, stating the Contract Termination Date (70.3).
- If at any time the Employer repeats the default, the Contractor may serve the Employer with a termination notice (70.6).
- Calculation of payment on termination under this heading includes work properly completed at the Contract Termination Date, overhead costs and profit for the works stated in the Contractor's Pricing Document and any costs or loss and/or expenses arising directly from the termination (70.7). Payment is to be made within 20 business days of receipt of the Contractor's Notice of Payment Due or within 60 business days of the Termination Date, whichever is later.
- Either party may terminate if part or the whole of the Works is suspended by reason of any of the Events listed in Appendix F for a continuous period of 120 business days or more. Such termination will be by notice stating that, if the suspension continues for a further five business days, it intends to terminate the Contractor's employment under the Contract (71.1).

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CIOB TCM15

- Within 60 business days of termination under clause 71, the Cost Manager is to issue to the Contractor a Penultimate Contract Valuation, which shall include the value of work properly completed at the date of termination, all Temporary Work, plant or welfare facilities, less any amount previously certified for payment (71.3).

8 Dispute avoidance and resolution

- Except in circumstances where a timescale is prescribed by the Contract, either party may, within 20 business days of the occurrence of an issue arising, give notice to the other of any issues they wish resolved (73.1). All notices requiring Issue Resolution are to be issued to the other party, with a copy to the Contract Administrator (73.2).
- As a precursor to Issue Resolution, the parties' representatives, or if they are unavailable then senior management, are to meet to resolve the issue (73.3).
- If the attempt at a negotiated resolution fails, or within ten days of a party giving notice of an issue requiring resolution, the Principal Expert shall be appointed to resolve the issue (73.4). The procedure is set out in Appendix G to the Contract (73.6). The Principal Expert is to issue its Determination within 20 business days of being appointed (73.7). The parties bear their own costs of the issue resolution and equal shares of the Principal Expert's fees (73.10).
- If the Principal Expert fails to deliver a Determination within the time allowed, either party is entitled to treat such matter as a dispute (74.3).
- The Contract indicates that the parties may use mediation or negotiation as the first step in dispute resolution (74.1).
- Adjudication is also provided for as a means of dispute resolution, either as an option if selected by the parties under Appendix B, or as a right under the Applicable Law (74.7).
- The final method for dispute resolution is arbitration, unless otherwise indicated in Appendix B, in accordance with the rules set out in detail in Appendix B (74.11).

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CIOB TCM15

This contract?

If considering using CIOB TCM15, the following points should be borne in mind.

TCM15 is for complex projects and may not be suitable for contracts of a simple nature.

The contractor must be particularly aware of the range of responsibilities placed on it by the contract, for instance the contractor is expected to ensure that it does not put the employer in breach of connected contracts. The appendices to the contract constitute an important document that should be completed carefully and read in conjunction with the main contract.

This contract provides detailed and well-drafted clauses relating to time management.

References and further reading

CIOB Time and Cost Management Contract 2015:
Document No. 1, Contract Agreement, 2015 Edition
Document No. 2, Contract Conditions, 2015 Edition
Document No. 3, Contract Appendices, 2015 Edition
Document No. 4, Subcontract Agreement, 2015 Edition
Document No. 5, Subcontract Conditions, 2015 Edition
Document No. 6, Subcontract Appendices, 2015 Edition
Document No. 7, Consultancy Appointment, 2015 Edition
Document No. 8, Schedules 8 and 9 for the appointment of the Time Manager, 2015 Edition
Document No. 9, Schedules 8 and 9 for the appointment of the Contract Administrator, 2015 Edition
Document No. 10 User Notes

CIOB, *Guide to Good Practice in the Management of Time in Complex Projects* (CIOB, 2010)

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CIOB mini forms

Chartered Institute of Building

CIOB Mini Form of Contract (General Use)

CIOB Mini Form of Contract for Home Improvement Agencies

The CIOB's mini forms of contract are intended for use on small projects of short duration. There are two versions of the form: one for general use and one for residential works. Both are written in plain English and come with a TrustMark endorsement. They are conventional design-bid-build forms of contract, managed by a contract administrator appointed by the employer. Although both contracts are relatively short, they include many provisions to be found in more comprehensive forms.

Background

In 1998, the CIOB took the innovative step of producing a document which they neatly styled a mini form of contract. Before this, it was impossible to find a standard form appropriate for very small jobs that also provided for the client to appoint an architect or other professional to act as a contract administrator. At the time, the mini had no real competitors.

The form is produced in two versions, one for general use and the other for use with residential works (originally developed in collaboration with Care and Repair England). Both forms have now been revised and were republished in 2011 by the CIOB in association with Dickinson Dees LLP and Northumbria University. They were republished in 2014 with an endorsement by TrustMark.

Structure

In appearance and structure the forms follow a fairly conventional construction contract format so may not be perceived as particularly user friendly. However, they are written in plain English and require the minimum of effort to complete.

The General Use version has six pages of conditions and the Home Improvements Agencies version has seven pages. Both versions of the form come with a dedicated letter of invitation and form of tender included as appendices. The appendices also include an insurance backed warranty that protects the employer in the event that the contractor ceases to trade or refuses to complete the work or remedy a defect or major damage and detailed provisions on fees where the works admit stage payments. Appendix 3 in both versions requires the contractor to indicate against a list of approved trades whether it is registered for these with TrustMark.

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CIOB mini forms

Use

These two forms are recommended for use on projects up to a value of £20,000 at 2011 prices, and both require the employer to appoint a contract administrator.

While the form for General Use might well be used on a construction contract to which Part II of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) applies, it is unlikely that the Home Improvement Agency version would be. Both versions, however, include payment provisions that comply with the HGCRA in Part 2 of Appendix 1. Whether or not the CDM Regulations 2015 apply in full would depend on the nature, scale and duration of the intended works, and the forms include reference to the CDM Regulations in the Agreement.

Synopsis: CIOB Mini Form of Contract for Home Improvement Agencies

The wording of the conditions in this version of the form is virtually identical to that of the form for General Use, as outlined below, except that the agreement requires that the Contractor commit no offence under the Bribery Act 2010 or the Local Government Act 1972 (4). There is a change in the numbering of the clauses from clause 4 onwards, so that the equivalent of the same clause on the Contract Administrator's duties in this form is clause 5, up to the final clause 13 on third parties.

Synopsis: CIOB Mini Form of Contract (General Use)

1 Roles

- The parties to the contract are the Employer and the Contractor, identified in the Memorandum of Agreement.
- The Contractor is required to be a TrustMark registered firm (A2).
- The Contractor is to carry out and complete the Works as described in the Contract Documents (A1).
- The Contractor is required to carry out the Works in accordance with all legal and statutory requirements, and to give all notices required by these (3.1).
- The contract requires that a Contract Administrator is identified in the first recital.
- The duties and powers of the Contract Administrator are set out in clause 4 and include preparing the Contract Documents and the design, issuing such instructions as are necessary (4.2), inspecting the Works and rejecting work not in accordance with the contract (4.3). Clause 4.3 states that the Contract Administrator is not responsible for any failure of the Contractor to carry out and complete the Works.
- Where the project is notifiable, the necessary appointments of a CDM Co-ordinator and Principal Contractor are to be made (A4 and A5).

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- The Contractor is not to subcontract the Works without the written approval of the Contract Administrator (8.3).
- Neither party may assign or otherwise dispose of its rights and obligations under the contract without the prior written consent of the other, except that such prohibition shall not affect assignment by way of security and assignments to subsidiary or associated companies within the same group of companies (8.1).
- The Contracts (Rights of Third Parties) Act 1999 is specifically excluded (12).

2 Documents

- The Contract Documents are described as being the 'Specification/Schedule of Works/Drawings' (the parties delete anything that does not apply) together with the Agreement (R2). The Contract Documents are to be signed by the parties to the Contract, and there is a page included for execution. The Contract Documents are prepared by the Contract Administrator named in the contract on behalf of the Employer (R1).
- The Works are described in R1 and further explained in the Contract Documents (Specification/Schedule of Works/Drawings/Programme) set out in Appendix 2.
- The Agreement and Conditions are to be read as a whole and are to take priority over other Contract Documents (A6).
- There is no list of defined terms; terms which are capitalised relate to entries made in the Agreement.
- There are no clauses regarding methods of communication but, generally, notices, etc are required to be in writing.

3 Control: time

- The Employer is to grant the Contractor sufficient access to the site to complete the Works (3.2).
- The Contractor is to proceed diligently and expeditiously with the Works (2.1).
- The Commencement Date and the Completion Date for the project are set out in clause 2.2.
- The Contractor is to inform the Contract Administrator in writing as soon as it becomes apparent that the Completion Date will not be achieved. It will be at the sole discretion of the Contract Administrator to grant an extension of time and this will be done in writing (2.3).
- Liquidated damages are to be paid for non-completion and delay not covered by an extension of time (2.4). The Employer must give the Contractor seven days' notice of its intention to withhold any liquidated damages from certified payments due or to recover the amount as a debt.

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4 Control: quality

- The Contractor is required to provide everything necessary for and to carry out the Works in accordance with the Contract Documents (3.1).
- The Contractor is to safeguard the Works generally and ensure the safety of people on site (3.4).
- Materials and goods are to be of satisfactory quality, reasonably fit for their purpose and in accordance with the Contract Documents. Similarly, workmanship must be of satisfactory quality. Both are to be in accordance with the relevant Agrément Board Certificates and current British Standards and Codes of Practice (5.1).
- Practical completion is to be certified by the Contract Administrator when, in his or her opinion, practical completion has been achieved (2.7).
- Unless otherwise provided by the parties, the defects period is to be three months, commencing from the date of practical completion (2.6).
- The Contractor is not exempted from liability for latent defects that may become apparent subsequently (2.8).

5 Control: cost

- The contract is let on a lump sum basis. The Contract Sum is exclusive of VAT and is stated in the Agreement at A3.
- The Contractor is not to carry out any additional work or incur expenses unless authorised in writing by the Contract Administrator (3.3).
- The Contract Administrator may issue instructions requiring a variation. Parties are to come to an agreement on the costs of such variation. Failing that, the Contract Administrator shall value it on a fair and reasonable basis (6).
- Payment is either a single payment after the Contract Administrator has certified rectification of all defects as required by clause 2.7 or at intervals to be set out in Appendix 1 (7).
- Where stage payments apply, the parties are expected to adhere strictly to Part 2 of Appendix 1, which provides that the Contractor is required to issue to the Employer and the Contract Administrator an application for interim payment at intervals set out in Appendix 1 Part 1, indicating the amount that the Contractor considers is due and the basis for its calculation. The Due Date for payment shall be the date on which the Employer receives the application (Appendix 1: 1).
- The Final Date for Payment is 14 days from the Due Date (Appendix 1: 1). No later than five days after the Due Date, the Employer or Contract Administrator shall issue a written notice specifying the payment proposed, what the sum relates to and how it was calculated (Appendix 1: 2). This amount will be due for payment on the final payment date unless a 'pay less notice' is issued by the Employer.

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- If the Contract Administrator fails to issue the notice, it shall be liable to pay the amount stated in the Contractor's interim payment application on the final date for payment unless a pay less notice is issued (Appendix 1: 4).
- If the Employer intends to pay less than the sum stated in its written notice or, where applicable, the Contractor's interim payment certificate, it shall, no later than five days before the Final Date for Payment, issue a notice of its intention and the grounds for paying less (Appendix 1: 3).
- The Contractor (or, where appropriate, the Employer) will be entitled to interest payments on any overdue amount not paid in full by the Final Date for Payment (Appendix 1: 9). The Contractor also has the right to suspend some or all of its obligations if a default on payment continues after a seven-day notice is issued and is entitled to reasonable costs and expenses incurred as a result of such suspension (Appendix 1: 5).
- There are detailed and similar provisions for the final certificate (Appendix 1: 6).

6 Insurance

- The Contractor is to insure, in the joint names of both parties, the Works, goods on site and other related risks, including a percentage for consultants' fees (9.1).
- The existing structures and contents are at the sole risk of the Employer, who must insure against the listed risks, including a percentage for consultants' fees (9.4).
- The Contractor is required to insure in joint names against loss and expenses arising from personal injury or death caused by and arising during the course of the Works. The same applies to injury and damage to real and personal property (9.9). There are no exceptions to this, eg the insurance is not limited to damage caused by the Contractor's negligence.
- The Contractor is required to provide a warranty that meets all TrustMark requirements (9.13).

7 Termination

- Termination of the contract may be by the Employer (10.1) for specified defaults of the Contractor and insolvency or by the Contractor (10.3) for specified defaults of the Employer and insolvency, or either party may terminate for neutral causes and the consequences for all types of termination are covered under clause 10.

8 Dispute avoidance and resolution

- The contract is governed by English law and English courts have jurisdiction. Disputes are to be resolved by adjudication and the final tribunal for resolution is the courts (11).

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This contract?

If considering using a CIOB mini form, the following points should be borne in mind.

It is intended only for very small domestic work valued at £20,000 at 2011 prices. Projects under this contract may not always be subject to Part II of the HGCRA. However, it is important to note that the contract has adopted adjudication as the initial dispute resolution procedure and incorporated the procedure of the Scheme for Construction Contracts (England and Wales) Regulations 1998 as amended. The contract also envisages that the employer will appoint a contract administrator, who will assist in the preparation of the contract documents as well as administering the contract.

The form is suitable for use in England and Wales.

The provisions are probably adequate for most work of this nature and the form is plainly worded.

The dedicated Letter of Invitation and Form of Tender should be used, because the latter becomes a contract document. When completing the documents, entries are also to be made in the text of the conditions.

If acting as contract administrator, note that the procedural rules are relatively simple and that the contract administrator is given considerable discretion and authority.

References and further reading

CIOB Mini Form of Contract (General Use)
CIOB Mini Form of Contract for Home Improvement Agencies

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Association of Consultant Architects 9

The Association of Consultant Architects (ACA) published its Form of Building Agreement in 1982 with the aim of providing an alternative to the relatively complex procedures of the JCT80. A second edition of the form was produced in 1984, a third in 1998 and a revision in 2003 before it went out of circulation. The ACA publish project partnering contracts, PPC2000 and TPC2005, as well as other contract forms, including the new Framework Alliance Contract FAC-1 and Term Alliance Contract TAC-1.

ACA Standard Form of Contract for Project Partnering (PPC2000) (amended 2013)

ACA Framework Alliance Contract (FAC-1) 2016

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ACA PPC2000

Association of Consultant Architects Ltd

ACA Standard Form of Contract for Project Partnering (PPC2000) (amended 2013)

PPC2000 is a multi-party contract intended for the procurement of a single project. It is structured in two stages. During the first stage, the parties develop the design of the project to meet client objectives and then, once the documents are sufficiently finalised, the employer may issue a commencement order so that construction can start on site. The contract places a strong emphasis on team working and includes many management strategies to achieve maximum collaboration and to minimise conflict, including the establishment of a core group 'to review and stimulate the progress of the project' and the appointment of a partnering adviser. All members of the team owe each other a duty of care.

Background

Generally, partnering as a concept denotes the intention of parties to work together to deliver a project or series of projects, with the objective of reducing disputes, avoiding confrontational/adversarial behaviour and refraining from self-serving activities, such as seeking commercial or legal advantage at the expense of the project/other project participants. It has been suggested that:

> The concept means that ideally all partners should benefit from the success of their collective efforts and conversely be prepared to share the consequences of failure. (Stanley Cox)

PPC2000 was produced by the Association of Consultant Architects and drafted by David Mosey of Trowers & Hamlins, Solicitors. As a partnering contract, it is a commendable attempt to bring together partnering arrangements, consultant appointment terms and a building contract into one document covering the whole process of delivering the project. It is the first standard form of contract for project partnering, the first multi-party building contract and it is an architect-led initiative. The driving force behind its conception was the belief that merging a partnering agreement and a building contract could benefit the partnering process.

Since its launch by Sir John Egan in September 2000, PPC2000 has received the recommendation of the Housing Forum, the Movement for Innovation, the Local Government Task Force and the Construction Best Practice Programme. It has also been endorsed by the Construction Industry Council and the Housing Corporation. It was amended in 2008 to relax the timetable on objection to instructions by the client representative and the time for the client representative to respond to a contractor's proposal. That amendment also featured new concepts, such as key performance indicators (KPIs), a risk register, a partnering timetable and project bank accounts,

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among others. Further amendments in 2011 and 2013 brought the contract into compliance with new legislation.

Structure

The contract runs to 60 pages, covering the project partnering agreement, the partnering terms and appendices.

The project partnering agreement is signed, or more likely executed as a deed, by the client, the constructor, client representative and each consultant or specialist member of the partnering team. The agreement will carry details of the project, the site, composition of the partnering team, partnering documents and core group composition. The design team and lead designer are identified, and any amendments to the design development process, as described in section 8 of the partnering terms, noted. Details are entered on other matters usually found in the appendices or contract data with conventional contracts, but in this contract matters such as incentives and insurance cover to be carried by each member of the partnering team are included in the partnering terms.

The partnering terms are set out under 28 headings. The language is plain English, but some terminology is peculiar to this contract and may be unfamiliar. Helpfully, there is a full set of definitions. There are eleven appendices, the content of which may be summarised as follows:

Appendix 1: Definitions

Appendix 2: Form of joining agreement (with a project of long duration inevitably there will be changes to the partnering team over time, and this is a mechanism for bringing in new joining parties who will be bound by the already established obligations)

Appendix 3:

- Part 1. Form of pre-construction agreement (this is, in essence, an agreement to cover preliminary or enabling works to be undertaken by the constructor)
- Part 2. Form of commencement agreement (confirmation by the partnering team that the project is ready to proceed to commencement of work on site)

Appendix 4:

- Part 1. Insurance of project and site
- Part 2. Third party liability insurance
- Part 3. Professional indemnity or public liability insurance
- Part 4. Insurance, general

Appendix 5:

- Part 1. Conciliation
- Part 2. Adjudication
- Part 3. Arbitration (if applicable)

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Appendix 6: Form of partnering timetable (this sets out clearly the nature, sequence and duration of the activities to be undertaken by each partnering team member, including outlining preconditions to any of the activities. Issues to be covered under this timetable include design development and submission, risk management actions (including any risk register), business case submission and client approvals, among others)

Appendix 7: Form of risk register (the risk register should outline the nature of each risk, likely impact on the project, the member of the team responsible for risk management actions, agreed risk management actions and the deadlines for the implementation of such actions)

Appendix 8: KPIs and targets (this appendix allows the parties to indicate any KPIs and the targets set for achieving them)

Appendix 9: Project bank account (this allows the parties to include a project bank account as part of their partnering agreement)

Appendix 10: Building information modelling (BIM) (this appendix allows the parties to define how BIM will be incorporated into the project)

Appendix 11: Public sector payment periods (this provides amended payment terms for public sector projects).

PCC2000 is unique and crosses traditional boundaries. It is a combination of project management principles, legal conditions and procedural rules. It is logically structured, with extensive cross-referencing. It facilitates an integrated team approach and seamless delivery of the project, but requires a high degree of commitment on the part of all concerned.

Use

Partnering depends on an effective management structure, attentive administration and good communications. It requires everyone involved to work together, so it is beneficial to set up the partnering team as early as possible in the process. PCC2000 also accepts that the composition of the partnering team is likely to change during the progress of the project and that there should be opportunities to add key specialists (sub-contractors, suppliers and sub-consultants) using a joinder agreement and SPC2000 as appropriate. The partnering team members' liabilities are proportional to their responsibilities, as are incentive payments.

A core group is to be established by the partnering team members, which must meet regularly to review and stimulate the progress of the project. Partnering team members must comply with decisions reached by the core group.

The client representative has considerable authority. They may call, organise, attend and minute meetings of the core group and partnering team, and may issue instructions to the constructor as empowered by the partnering terms. The client

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representative will also be responsible for organising partnering workshops for the partnering team. However, restrictions can be placed on the representative's authority, which are to be entered in the project partnering agreement.

The agreement requires a partnering adviser to be named, who will be a person who brings enthusiasm and a knowledge of partnering, and preferably already has a good track record. This role has a wide remit, which may include: advising on the selection of team members and team building; advising on the preparation of the project partnering agreement and any of the agreements listed in Appendix 3; advising on the partnering process, partnering relationships and partnering contracts; attending relevant meetings of the core group and partnering team; and assisting in the solving of problems and resolution of disputes. This might be seen as a tall order!

The partnering documents are listed as being:

- the commencement agreement
- the project partnering agreement
- the partnering terms
- the project timetable
- the partnering timetable
- consultant's services schedules and payment terms
- the project brief
- the project proposals
- the price framework
- any joining agreements
- any pre-construction agreement
- any risk register
- the KPIs and targets
- any other partnering documents.

Unless anything is stipulated to the contrary, this is the order of priority that prevails in the event of discrepancy or dispute regarding documents.

The ACA advises that, at the time of signing the project partnering agreement, the partnering team should have agreed the following:

- the client's project brief and the constructor's project proposals
- an initial price framework
- provisional KPIs
- consultant's services schedules and payment terms for those appointed by the client.

With so many separate arrangements, the agreement cannot be stated in terms of a lump sum contract. The client is required to pay to the constructor any agreed amounts properly due in respect of pre-construction agreement activities and an agreed maximum price for delivering the project, calculated by reference to the

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price framework and other relevant partnering documents. The client is also responsible for paying to the consultants any agreed amounts properly due under the consultant payment terms.

Synopsis

1 Roles

The parties are the Client, the Constructor and all other parties that execute the Project Partnering Agreement (1.1). Partnering Team members must work in a spirit of trust, fairness and mutual cooperation for the benefit of the Project (1.3).

- All Partnering Team members are to use reasonable skill and care appropriate to their respective roles, expertise and responsibilities, and owe to each other such duty of care as stated in the Project Partnering Agreement (22.1).
- The Agreement can also include for a design obligation by the Constructor. In this event the obligation under clause 22.1 can be amended in the Project Partnering Agreement so that the Constructor accepts full responsibility to the Client for the design, supply, construction and completion of the Project, including the selection and standards of all materials, goods, equipment and workmanship, and including any design undertaken before or after the date of the Commencement Agreement by any other Partnering Team member (other than the Client). The Constructor may also be required to warrant that the completed Project shall be fit for its intended purposes.
- Partnering Team members must comply with all laws and regulations currently in force in the country stated in the Partnering Agreement (ie the applicable law) and in the country in which the site is located, and with all statutory and other legal requirements (25.4).
- The Constructor will act as the principal contractor for the purposes of the CDM Regulations 2015, and the principal designer will be the person named in the Project Partnering Agreement (7.1; note there is no place to enter this in the printed version, an entry would need to be added).
- All Partnering Team members must fulfil their obligations under the CDM Regulations, including preparation of the Pre-Construction Information and the Construction Phase Plan (7.1).
- Each Partnering Team member shall use reasonable skill and care to ensure that all individuals for whom it is responsible adhere to the Partnering Contract, and each member will be liable to the other members for any loss, damage, injury or death caused by employees under its control (7.4).
- Each Partnering Team member also warrants that it has the 'skills, knowledge, experience and organisational ability' to fulfil the roles it is appointed to in relation to the CDM Regulations (7.7).

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- Partnering objectives, which apply to each member of the Partnering Team, including the Client and the Constructor, are set out under seven headings in clause 4.1. The objectives operate from the design stages through to completion of the Project at the agreed time, price and quality. The list includes: innovation, improved efficiency, cost-effectiveness, lean production, reduction of waste, measurable continuous improvement (by reference to KPI targets) and trust, fairness and mutual cooperation.
- Partnering objectives are followed by KPI targets, listed under ten headings. Each member of the Partnering Team undertakes to pursue these for the benefit of the Project and for the mutual benefit of the team's members (4.2).
- In all matters, the Partnering Team members shall act reasonably and without delay (1.7).
- The Partnering Team members are required to establish a Core Group, the membership of which is to be listed in the Project Partnering Agreement (3.3).
- Decisions of the Core Group are by consensus and Partnering Team members must comply with authorised decisions (3.6).
- The Project Partnering Agreement requires the appointment of a Partnering Adviser, who may provide advice to the Partnering Team members in all matters relating to the Partnering Contract and on partnering relationships, as set out in clause 5.6.
- The Partnering Adviser as named in the Project Partnering Agreement may be replaced at any time by a decision of the Core Group (5.7).
- Partnering Team members operate an early warning system, and each member notifies the others as soon as it is aware of matters adversely affecting the Project (3.7).
- Meetings of the Partnering Team are convened by the Client Representative, as scheduled or requested, and will normally be chaired by the Client Representative. Only matters listed on the agenda will be dealt with, and decisions are by consensus (3.8).
- Partnering Team members are to develop arrangements for secondments, office sharing arrangements, access to computer networks and databases, etc as may benefit the Project (3.10).
- Partnering Team members are to pursue together any joint initiatives that might benefit the Project. Such initiatives are considered by the Core Group (24.1).
- Partnering Team members must keep records as required by the Partnering Documents and must permit inspection by other members of the Partnering Team (3.11).
- The Client Representative is to act in accordance with the Partnering Terms and other Partnering Documents to facilitate an integrated design, supply and construction process (5.1).

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- The Client Representative is authorised to represent the Client in all matters, except membership of the Core Group, and always subject to any restrictions stated in the Project Partnering Agreement (5.2).
- The Client Representative may issue instructions to the Constructor, where they are consistent with the Partnership Documents (5.3).
- The Client Representative is to call, organise, attend and minute meetings of the Core Group and Partnering Team members as required or scheduled (5.1).
- The Client Representative organises workshops for the Partnering Team members and organises and monitors contributions of Partnering Team members to value engineering, value management and risk management exercises (5.1).
- The Partnering Team members may seek the advice and support of the Partnering Adviser on a range of matters, including those listed in clause 5.6.

2 Documents

- The Partnering Documents govern the relationships between the Partnering Team members (2.1).
- The Partnering Documents comprise the Project Partnering Agreement and the Partnering Terms, together with any of the documents listed in clause 2.2.
- The priority of documents in the event of a discrepancy is as listed in clause 2.6.
- Communications between Partnering Team members are to be in writing, except where otherwise agreed (3.2).
- Each Partnering Team member retains intellectual property rights in all designs and other documents that it prepares for the Project, but grants to the Client and other Partnering Team members a licence to copy and use such designs as required to complete the Project (9.2).
- Nothing in the Project Partnering Agreement or Partnering Terms confers any benefits or rights on third parties, unless expressly stated otherwise (22.4).
- Nothing in the Partnering Documents creates a partnership between Partnering Team members (25.1).
- Any additional terms to be imported into the contract must be identified as special terms by reference to clause 28 and must be set out in or attached to the Project Partnering Agreement or the Commencement Agreement (28).
- Each Partnering Team member is to provide or obtain collateral warranties as listed in the Project Partnering Agreement (22.2).
- The Constructor is to obtain Specialist warranties in favour of the Client (22.3).

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3 Control: time

- The Partnering Timetable (a Partnering Document) sets out the activities of the Partnering Team members during the pre-construction period (6.1).
- The Project Timetable sets out the timetable for implementation of the Project following the Commencement Agreement.
- Members of the Partnering Team are to proceed regularly and diligently in the stages and by the dates in the Partnering Timetable (6.1).
- The Project Timetable is to be annexed to the Commencement Agreement and entries will show the Date of Possession and Date for Completion (6.2). The Constructor will submit the proposed timetable to the Client Representative for review by the Core Group and approval by the Client (6.2).
- Where the Project is to be completed by Sections, then Completion Dates will relate to each Section and to the Project (6.3).
- Possession of the Site by the Constructor may be exclusive or non-exclusive, and programming may take this and any arrangements for deferred possession and interrupted possession into account (6.4).
- The Client Representative may instruct acceleration, postponement or resequencing of any date or period in the Project Timetable (6.6).
- The Constructor will update the Project Timetable regularly and circulate it to the other Partnering Team members (6.7).
- The Constructor is to use its best endeavours at all times to minimise any delay or increased costs in the Project (18.3).
- An appropriate extension to the Date for Completion may be given for any one of 16 reasons listed in detail, all due to matters beyond the Constructor's control (including some neutral causes) (18.3).
- The Constructor must notify the Client Representative as soon as it becomes aware of an event that might cause delay (as listed in clause 18.3) and supply appropriate evidence and detailed proposals for overcoming the event or minimising its impact (18.4).
- The Client Representative must respond within 20 Working Days of the notification and make a fair and reasonable extension of time. The Client or the Constructor has 20 Working Days from the date of the Client Representative's notice to dispute the award (18.4).
- An extension of time that affects a Consultant but which was not caused by a default of the Consultant will entitle it to an equivalent extension of time for performance of its Consultant Services (18.7).

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- The Client Representative issues a notice to the Client and Constructor when it considers that Project Completion has been achieved (21.2). If the date of Project Completion is later than the Date for Completion, any compensation payable under the contract terms would depend on an Incentive having been set up that links payment to achievement of the Date for Completion (13.3).

4 Control: quality

- The Lead Designer and other Design Team members are required to develop the design of the Project, with the objective of achieving best value for the Client (8.1). Each Design Team member's role and responsibilities in relation to the design are as set out in the Partnering Documents (8.2).
- During pre-commencement stages, the Lead Designer submits outline designs to the Client and the Core Group. Following Client approval, developed designs are submitted to the Client and the Core Group, with sufficient detail for a full planning application (8.3).
- Following Client approval, and after Core Group consultation, the Lead Designer applies for full planning permission (if required). With other Design Team members, the Lead Designer then brings the design to the level necessary to enable the selection of Specialists and the development of the Price Framework, and to satisfy any planning conditions and other regulatory approvals (8.3).
- After commencement, all further design work is prepared and submitted to the Client and other Partnering Team members for approval or comment in accordance with periods stated in the Project Timetable. The Lead Designer is responsible for coordinating this process (8.6).
- The Partnering Team Members are required to work together and individually to achieve the quality of the Project described in the Partnering Documents (16.1), and to implement a Quality Management System as set out in the Project Brief, Project Proposals and Consultant Services Schedules (16.3).
- The Constructor will give the Client Representative five Working Days' notice when it considers that Project Completion has been achieved. The notice invites the Client Representative to inspect and test as appropriate (21.1).
- The Client Representative, together with other appropriate Partnering Team members, shall carry out inspections and testing. Within two Working Days following completion of this, the Client Representative shall issue a notice to the Client and Constructor either confirming that Project Completion has been achieved or indicating aspects of the Project that the Constructor must rectify (21.2).
- Following completion of the Project, the Constructor must rectify any defects, excessive shrinkages or other faults in the Project that are due to materials, goods, equipment or workmanship not in accordance with the Partnering Documents within the Defects Liability Period (entered in the Project Partnering Agreement) (21.4).

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- The Client Representative shall issue a notice to the Client and the Constructor confirming that the defects have been rectified (21.5).

5 Control: cost

- Where the Constructor performs any services prior to the date of the Commencement Agreement, the Constructor is paid according to the Price Framework (12.1).
- Where the Constructor undertakes Pre-Construction Activities under a Pre-Construction Agreement, the Constructor is paid the amounts entered in the Pre-Construction Agreement (12.2).
- The Agreed Maximum Price will be developed by reference to the Price Framework and other Partnering Documents and is to be entered in the Commencement Agreement (12.3). This is the sum payable by the Client to the Constructor, subject to increases or decreases in accordance with the Partnering Terms.
- Any fluctuation provisions must be set out in the Price Framework and Consultant Payment Terms (20.11).
- If the Partnering Documents link payment to performance targets stated in the KPIs, then when the level of achievement of the Constructor or a Consultant is demonstrable, the Client Representative will determine the consequential additional or reduced payment (13.3).
- Where an extension to the Date for Completion is awarded for certain events, the Constructor shall be entitled to additional payment in respect of site overheads and unavoidable additional work or expenditure (18.5 and 18.6).
- Applications for payment are submitted by the Constructor and by each Consultant to the Client and the Client Representative at the intervals stated in the Project Brief or, if none are stated, at the end of each calendar month. Payment can also be related to payment milestones, activity schedules, etc as set out in the Price Framework. Each application must state the sum the relevant Consultant or Constructor considers due to it on the payment due date, as well as the basis for the calculation of the sum. The application shall be accompanied by details as stated in the Project Brief, and such further information as the Client Representative may reasonably require (20.2).
- The due date for payment is the date the Client receives the relevant application from the Consultant or Constructor (20.2).
- The Client Representative will issue a payment notice within five Working Days from receipt of a payment application from the Constructor (or when otherwise required by the Partnering Terms). The payment notice will specify the sum due to the Constructor at the relevant due date and the basis for calculation of that sum. Unless a 'pay less notice' is issued in accordance with clause 20.7, the Client shall pay the Constructor the sum stated as due in the payment notice by the final date for

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payment. Except where revised dates are stated in the Price Framework, the final date for payment by the Client shall be the later of 20 Working Days from the due date for payment or 15 Working Days from the receipt by the Client of any required VAT invoice from the Constructor (20.3).

- The Client will issue a payment notice within five Working Days from the receipt of a payment application from a Consultant in accordance with clause 20.2. The payment notice must be calculated according to the relevant Consultant Payment Terms, taking account of any sums that may be due under clauses 20.10 and 20.17. The notice must state the sum the Client considers is due on the payment due date and the basis on which this sum was calculated. Unless a 'pay less notice' is issued under clause 20.7, the Client is to pay the amount stated in the payment notice on the final date for payment, which is the later of 30 Working Days from the payment due date or 25 Working Days from the receipt by the Client of the relevant VAT invoice from the Consultant (20.4).
- Where the Client or the Client Representative fails to issue a payment notice, the relevant payment application by the Consultant or Constructor is deemed to be a payment notice (20.6). In this case, the Client would be liable to pay the sum stated in the application by the final payment date.
- Not later than two Working Days before the final date for payment of any sum due under the Contract, the party that is due to make the payment may issue the payee with a notice of its intention to pay a sum that is less than the amount stated in the payment application. Such a 'pay less notice' will state the sum that the payer believes is due at the time of the service of the notice and the basis for the calculation of this sum (20.7).
- Where the payer serves a pay less notice under clause 20.7, the amount to be paid on the final date for payment is as stated in the pay less notice (20.7(i)).
- Delay in payment by the Client (or the party liable to make a payment) beyond the final date for payment will result in interest being added to the amount, at the percentage specified in the Project Partnering Agreement (20.10).
- A delay in payment by the Client may also give a Consultant or the Constructor the right to suspend some or all of its obligations until payment is received in full. The Constructor or Consultant must give seven Working Days' notice of suspension to the Client, requiring rectification of the default, and suspension can only proceed if the Client fails to make payment within this period. In the event of such suspension, the Constructor or Consultant will be entitled to a reasonable amount for costs and expenses it incurs (20.17).
- Within 20 Working Days following Project Completion (or as stated in the Price Framework) the Client Representative shall issue to the Client and the Constructor an account confirming the balance of the Agreed Maximum Price due. The Client

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and Constructor shall seek to agree the balance, taking into account any adjustments and the amount stated as retention in the Price Framework (20.15).

- Within 20 Working Days following notice by the Client Representative confirming that the Constructor has fulfilled all obligations in respect of rectifying defects, the Client Representative shall issue to the Client and the Constructor a Final Account. When agreed, this will be conclusive evidence as to the balance of the Agreed Maximum Price due, and the Client Representative shall then issue a Final Account valuation (20.16).
- The Contract includes detailed provisions for final payment, which parallel the provisions on interim payments (20.16).

6 Insurance

- Insurance of the Project and of the Site, including structures on it, will be the responsibility of the Partnering Team member or members named in the Commencement Agreement, and should be in the joint names of the Constructor and the Client and with waivers of subrogation as shown in the Commencement Agreement. The risks to be insured and the durations of insurance are as stated in Part 1(1) of Appendix 4 (19.1).
- Where stated in the Commencement Agreement, the named Partnering Team member is to take out insurance in respect of damage to property other than the Project not caused by a default of the Constructor or a Specialist or Consultant and which could not reasonably have been foreseen, as set out in Part 1(2) of Appendix 4 (19.1).
- Each Partnering Team member is to take out and maintain third party liability insurance for the amount stated in the Project Partnering Agreement and in accordance with Part 2 of Appendix 4 (19.3).
- Professional indemnity or product liability insurance is to be taken out by Partnering Team members named in the Project Partnering Agreement in accordance with Part 3 of Appendix 4 (19.4).
- Further required insurances, if specified in entries in the Commencement Agreement, can include Environmental Risk Insurance (19.5), Latent Defects Insurance (19.6) and Whole Project Insurance (19.7).

7 Termination

- The Client may terminate the appointments of all Partnering Team members prior to the date of the Commencement Agreement if it no longer wishes to proceed with the Project either because of failure to achieve the pre-conditions to a start on site as set out in clause 14.1 or for any other reason not foreseeable by the Client prior to the date of the Commencement Agreement. The procedure for giving notice and the consequences are set out in the Partnering Terms (26.1).

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- The Client (or Constructor as appropriate) may terminate the appointment of a Partnering Team member for material breach of the Partnering Contract (26.3).
- The appointment of a Partnering Team member will automatically terminate in the event that the member becomes bankrupt or insolvent (26.2).
- The Client may terminate the appointment of the Constructor for specified defaults or breaches of the Partnering Documents. The procedure for giving notice and the consequential actions are set out in the Partnering Terms (26.4).
- A Partnering Team member may terminate its own appointment in the event of specified defaults or breaches of the Partnering Documents by the Client. The procedure for giving notice and the consequential actions are set out in the Partnering Terms (26.5).
- If after the Date of Possession it becomes impossible to proceed with or complete the Project due to specified reasons, the Constructor must give notice to the Client Representative. A Core Group meeting must be convened to consider the position and possible solutions. If an acceptable solution cannot be found then the Client may suspend or abandon the Project (26.6).
- Termination of the appointment of any Partnering Team member does not affect the mutual rights and obligations of that and the other Partnering Team members (26.15).

8 Dispute avoidance and resolution

- In the event of any difference or dispute with other Partnering Team members, a member must give notice to the other members and the Client Representative (27.1).
- The Partnering Team members involved are to apply the Problem-Solving Hierarchy shown in the Project Partnering Agreement, guided as necessary by the Partnering Adviser (27.2).
- Where use of the Hierarchy fails to provide an acceptable solution within a stated timetable, the Client Representative will convene a meeting of the Core Group in an attempt to reach an agreed solution (27.3).
- If the dispute is still not resolved, the parties may choose to refer the matter to conciliation (as described in Part 1 of Appendix 5), to mediation or to any other form of alternative dispute resolution (27.4). The Conciliator may be named in the Project Partnering Agreement.
- The parties involved may exercise the right to refer their difference to adjudication (27.5) in accordance with Part 2 of Appendix 5. The Adjudicator may be named in the Project Partnering Agreement and the procedure follows the Construction Industry Council's Model Adjudication Procedure.

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- If the difference or dispute is not finally resolved by adjudication, the parties may refer the matter either to arbitration or to the courts (27.6). Arbitration is covered in Part 3 of Appendix 5. The nominating body for an Arbitrator may be named in the Project Partnering Agreement. Although the Partnering Terms state the dispute 'may' be referred to arbitration, Appendix 5 Part 3, states it 'shall' be referred, which suggests that the drafters intended this to be a binding arbitration agreement, ie one whereby the parties agree to use arbitration exclusively. If the parties intend this, it may be sensible to clarify this in the Project Partnering Agreement.

This contract?

If considering using PPC2000, the following points should be borne in mind.

It is the only standard contract specifically drafted for project partnering.

The conditions are plainly worded and easy to read.

However attractive the notion of a single contract bringing all important parties together in a binding relationship is, inevitably this calls for an open and receptive mind.

Contract administration and project management under this contract require experience and expertise. It is encouraging that the contract has been used in practice with successful results.

If the ultimate in partnering arrangements is desired, then this form, which is the result of an architect-led initiative, has no competitors as yet.

References and further reading

ACA Standard Form of Contract for Project Partnering (PPC2000) (amended 2013)
ACA Standard Form of Contract for Project Partnering (PPC International) (issued 2008)
ACA Standard Form of Contract for Term Partnering (TPC2005) (amended 2008)
ACA Standard Form of Specialist Contract for Project Partnering (SPC2000) (amended 2008)
ACA Standard Form of Specialist Contract for Project Partnering Short Form (SPC2000 Short Form) (issued 2010)
ACA Standard Form of Specialist Contract for Term Partnering (STPC2005) (issued 2010)
Scottish Supplement to PPC2000 (PPC(S)2000)

Mosey, D. *Guide to ACA Project Partnering Contracts PPC2000 and SPC2000*, Bromley: ACA (2003)
Mosey, D. *Early Contractor Involvement in Building Procurement: Contracts, Partnering and Project Management*, Chichester: Wiley-Blackwell (2009)
Paul, C. and Rees, R. *Guide to ACA Term Partnering Contracts TPC2005 and STPC2005*, Bromley: ACA (2010)

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ACA FAC-1

Association of Consultant Architects

ACA Framework Alliance Contract (FAC-1)

The ACA Framework Alliance Contract (FAC-1) (2016) is a multi-party contract intended for use by a client that wishes to establish a collaborative relationship with multiple service providers, whom it anticipates using to undertake work on one or more projects. It also establishes framework objectives and includes provisions aimed at encouraging the parties to work together to achieve those objectives, including incentive arrangements. The contract sets out mechanisms whereby the alliance members may be asked to undertake pre-construction tasks (on the FAC-1 terms) and a system whereby whole projects may be let (on one of the identified sets of contract terms, which could be any standard form contract or appointment). The alliance team members are also liable to each other, although this liability is limited to a selection of their obligations.

Background

FAC-1 is unique in combining the features of a framework arrangement (where a body enters into an agreement with a provider so that work/services related to specific projects may be 'called-off') with those of an alliancing agreement (where a team agrees to work together to meet agreed targets, and to share some of the risks and rewards).

Structure

FAC-1 is necessarily a complex document, although relatively short in length. It depends on a significant amount of information being set out within the alliance particulars, schedules and other contract documents, most importantly the work and services that may be provided, the prices for these and the terms under which they will be undertaken.

The framework documents comprise the schedules and terms, the framework brief, the framework prices and the framework proposals, the alliance manager's services schedule and the alliance manager's payment terms. The framework brief is a key document as it describes the scope and nature of the alliance and of the projects comprising the framework programme and sets out the client's requirements regarding a range of matters. There are six schedules to the agreement, as follows: schedule 1, objectives, success measures, targets and incentives; schedule 2, timetable; schedule 3, risk register; schedule 4, direct award procedure and competitive award procedure; schedule 5, template project documents; and schedule 6, legal requirements and special terms.

The contract terms cover around 13 pages, and are grouped under 15 section headings. Key among these are the obligation placed on the alliance members to seek to achieve the defined objectives (2.1), the duty of care they owe to the client

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for specific matters, such as project proposals and agreed prices, and the limited duty of care they owe to each other (10). Also important are the obligation to implement alliance activities, the means of ordering pre-construction activities and the award of project contracts (5).

Use

FAC-1 is intended to be used with either one or several underlying contracts, and is entered into for a term set out in the framework particulars (at the back of the form). It can be used alongside any other standard form contract.

The agreement requires various entries to be made, including identification of the core team members and the alliance manager, the alliance activities, required insurance, etc. It includes a section for execution by the client, the alliance manager and the other alliance members, either as a simple contract or as a deed.

Synopsis

1 Roles

- The parties to the Framework Alliance Contract are the Client and all other Alliance Members who execute the Agreement section of the contract, together with any Additional Clients or Additional Alliance Members who later execute Joining Agreements.
- The Alliance Members agree 'to work together in an alliance, to fulfil their roles and responsibilities and to apply their agreed expertise in relation to the Framework Programme, in accordance with and subject to the Framework Documents'. They also agree that the roles, expertise and responsibilities are as described in the Framework Documents. Essentially, the Alliance Members agree to fulfil their responsibilities as set out in the Framework Documents.
- The contract does not set out any consideration for this broad undertaking. However, payment for specific Alliance Activities may be arranged under an Order or as part of a Project Contract.
- The contract refers to an Alliance Manager, who exercises the functions set out in clause 3.1, subject to any restrictions entered in the Agreement. The functions include preparing Project Contracts, monitoring achievement of Objectives, Success Measures and Targets, organising and chairing meetings, organising Supply Chain Collaboration, managing payments and Incentives, and supporting Risk Management.
- The Alliance Manager is authorised to act on behalf of the Client in any matters listed in the Agreement (3.2).
- Additional Clients and Additional Alliance Members may later join the Alliance by executing Joining Agreements (a form of Joining Agreement is set out in Appendix 2). Following execution of the Joining Agreement, these parties are bound by and

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entitled to implement and enforce the terms of the Framework Alliancing Contract (1.11.2). If an Additional Client implements certain provisions, such as the award of a Project Contract, only that Additional Client will be liable to the Alliance Members (1.11.3).

- There is a Core Group that comprises the individuals listed in the Agreement or who later execute a Joining Agreement. The Core Group members are appointed by the Client, by the Alliance Manager and by Alliance Members. All Core Group members who are employees of Alliance Members are required to fulfil the tasks set out in the Framework Documents or agreed by the Alliance Members (1.6).
- A key duty of the Alliance Members (which include the Client and the Alliance Manager) is to work together in a 'spirit of trust, fairness and collaboration for the benefit of the Framework Programme' (1.1).
- Alliance Members are required to undertake Alliance Activities (6). The Client may sign an Order describing a payment to be made for Alliance Activities, but the general obligation to implement the Alliance Activities does not appear to be dependent on an Order being issued.
- The contract also envisages that the Alliance Members may undertake Pre-contract Activities (7). In this case, as there is no separate obligation to undertake these; they appear to be dependent on an Order being issued (7.1).
- Both the Alliance Activities and the Pre-contract Activities are separate from any duties an Alliance Member may accept under a Project Contract and are governed by the Framework Alliance Contract Terms, unless the Order states that they are subject to a Project Contract (7.2).
- Other than Alliance Activities and Pre-contract Activities, any other provision of work, materials or services would need to be the subject of a specific Project Contract.
- When the Client wishes to award a Project Contract to an Alliance Member, it can do so using either the Direct Award Procedure or the Competitive Award Procedure (as indicated in clause 5). The details of both procedures are set out in Schedule 4 to the Agreement. The terms of the Project Contracts are to be set out in Schedule 5, which could of course refer to any standard form contract or comprise bespoke terms.
- The Objectives, Success Measures, Targets and Incentives of the Framework Alliance Contract are set out by the parties in Schedule 1 to the Agreement. The Alliance Members must 'seek to achieve' the Objectives (2.1), and their performance is assessed against the Success Measures and Targets (2.2). The Incentives may include financial incentives, which will form part of a Project Contract or Order (2.3).
- The Alliance Members are required to use reasonable skill and care appropriate to their respective roles, expertise and responsibilities (10.1). They owe each other a duty of care (10.2), with certain restrictions: in respect of specific documents, this

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duty is owed only to the Client and the Alliance Manager (10.3); only the Client owes a duty to the Alliance Manager regarding payment (10.4); and under an Order the duty of care is between the Client, the Alliance Manger and the Alliance Member that signs it (10.5).

- Any Alliance Member that prepares a Framework Document (or Documents) is responsible for any errors it contains, or for any discrepancies between those Documents, except to the extent that it relies on information provided by another Alliance Member (1.4).
- As FAC-1 is intended to be suitable for a variety of jurisdictions, it contains no references to specific pieces of legislation. Instead, all Alliance Members are required to comply with all laws and regulations currently in force in the country stated in the Agreement. The parties may set out additional Legal Requirements in Schedule 6, with which all Alliance Members must comply (13.4).

2 Documents

- FAC-1 comprises the Framework Alliance Agreement (with six schedules), the Contract Terms and four appendices.
- The Framework Documents are described in the Agreement as comprising the Agreement, the schedules and the Contract Terms, together with the Framework Brief, the Framework Prices and the Framework Proposals, the Alliance Manager Services schedule and the Alliance Manager Payment Terms. If any conflict between these documents is not resolved using the clause 1.8 Early Warning process, the priority between the documents is as per the order in which they are listed in the Agreement (1.5.2).
- The Framework Brief describes the scope and nature of the Alliance and of the Projects comprising the Framework Programme, and sets out the Client's requirements regarding a range of matters. The Framework Programme is defined as 'the works and/or services and/or supplies governed by the Framework Alliance Contract, as described in the Framework Documents'. The Framework Programme is not listed as a Framework Document.
- The Framework Prices and the Framework Proposals are 'as agreed confidentially between the Client, any additional Clients, the Alliance Manager and any other Alliance Member'. In effect, the proposals put forward by an Alliance Member to meet the brief, and its prices for this, will be agreed with the Client and the Alliance Manager, but will not be seen by any other Alliance Member (13.3.2). The Alliance Manager Services schedule is not confidential, but its payment terms are (13.3.1).
- The Agreement requires various entries, including identification of the Core Group members and the Alliance Manager, the Alliance Activities, required insurance, etc. It also has a section for execution by the Client, the Alliance Manager and the other Alliance Members, either as a simple contract or as a deed.

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- The six schedules to the Agreement are as follows: Schedule 1 – Objectives, Success Measures, Targets and Incentives; Schedule 2 – Timetable; Schedule 3 – Risk Register; Schedule 4 – Direct Award Procedure and Competitive Award Procedure; Schedule 5 – Template Project Documents; Schedule 6 – Legal Requirements and Special Terms.
- A list of definitions is included as Appendix 1. Appendix 2 is a form of Joining Agreement, Appendix 3 is a form of Order and Appendix 4 sets out dispute resolution procedures.
- No Alliance Member may assign or sub-contract any of its rights or obligations under the Agreement or any Order without the prior consent of the Client (13.2). The consent of the Alliance Manager or the other Alliance Members is not required.
- Rights of third parties are expressly excluded, except as implemented through a Joining Agreement or as set out in relation to clause 10.6 (duties to other parties) (13.6).

3 Control: time

- A contract start date and framework duration period are entered in the Agreement. The duration is subject to extension or early termination by agreement between Alliance Members (14.1).
- A Timetable, which includes 'agreed deadlines, gateways and milestones', is set out in Schedule 2. Alliance Members are required to work within the timescales set out in the Timetable in implementing their Alliance Activities (2.5 and 6.1).
- The Alliance Manager is required to update the Timetable for the approval of the Core Group should certain events occur, including the addition of Alliance Activities, any Joining Agreements and clause 9.1 changes (2.6).
- It is possible that one or more of the Targets to be set out in Schedule 1 (Part 2) may also have a time element. If this is the case and it appears the Target will not be achieved by the relevant time, it would be subject to the 'target not achieved' procedure in clause 14.2 (discussed in section 5 below).
- Where an Order is issued to cover Alliance Activities or Pre-contract Activities, this will include a date or dates for completion of those activities (Appendix 3: 3).

4 Control: quality

- The quality of the work to be carried out under any Project will be set out in the Project Brief, and the detailed procedures for inspections, tests, rectification of defects, etc will be set out in the Project Contract.
- The Framework Objectives may also set out general quality requirements for the Framework Programme.

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ACA FAC-1

- Each Alliance Member, within the scope of its agreed role, expertise and responsibilities, is required to submit to the Core Group proposals for achieving Improved Value, consistent with the Framework Objectives. Improved Value is defined as including improved quality (2.2).

5 Control: cost

- The Client is obliged to pay the Alliance Manager in accordance with the Alliance Manager Payment Terms. The Client is under no obligation to pay any other Alliance Member for discharging their obligations unless an Order for Alliance Activities or Pre-contract Activities is agreed, or in relation to a Project Contract (8.1 and 8.2).
- The Framework Documents include Framework Prices that have been agreed between an Alliance Member and the Client before entering into the Framework Alliance Contract, and which are confidential to that Alliance Member.
- The Agreed Prices for a Project must be developed in accordance with the Framework Prices, and with any Budget stated by the Client for that Project in the procedure (direct or competitive) used to award the Project (4).
- Each Alliance Member, within the scope of its agreed role, expertise and responsibilities, is required to submit to the Core Group proposals for achieving Improved Value consistent with the Objectives. Improved Value is defined as including improved cost certainty and cost savings (2.2).
- It is likely that one or more of the Targets set out in Schedule 1 (Part 2) will be a maximum price for all or part of the Framework Programme. If it appears that a Target will not be achieved, the 'target not achieved' procedure in clause 14.2 would apply. Under this procedure, the Core Group must meet and propose actions necessary to meet the Target. If agreed, these are signed by all Alliance Members as a supplement to the Timetable. If not agreed, the Client may, provided the required notices are issued, withdraw from or terminate the Alliance.
- The Client and any other Alliance Member may, by signing an Order, agree the payment to be made for specified Alliance Activities or Pre-contract Activities (7.1).
- The payment procedure for a specific Project is set out under the Project Contract, not the Framework Alliance Contract (8.1). The Framework Alliance Contract does, however, set out the payment procedure for the Alliance Manager and for agreed amounts due to an Alliance Member under an Order.
- In relation to payments to an Alliance Member under an Order, the Alliance Member submits an application for payment at the end of each calendar month complying with clause 8.2. The Alliance Manager then issues a payment notice within five Working Days to the Alliance Member and to the Client. In the case of payments to the Alliance Manager, the Alliance Manager submits an application to the Client, and the payment notice is issued by the Client. If no payment notice is issued, the application becomes the payment notice.

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- Payment of a payment notice must be made within 20 Working Days of the due date.

6 Insurance

- Each Alliance Member is required to take out insurance of the types and amounts listed in the Agreement and under the terms stated (12.1 and 12.2). (There are no default amounts in the Agreement, so if no details are set out, there would be no obligation to insure.)
- Each Alliance Member must provide copies of the relevant policies to any other Alliance Member on request (12.3).

7 Termination

- The Client or Alliance Manager may terminate an Order at any time with ten Working Days' notice. The Alliance Member that signed the Order is not given similar rights (7.5).
- Clause 14 requires that, if a Target is not met, the Core Group shall meet and propose solutions (14.2.1). If the Client gives notice that it does not approve these proposals, it may, after giving a further ten Working Days' notice, withdraw from the Alliance (14.2.2).
- Alternatively, the Client may terminate the Framework Alliance Contract, after giving not less than ten Working Days' notice, if any of the Targets set out in Schedule 1 are not achieved. The Client may also terminate the appointment of any Alliance Member that has failed to meet Targets, again after giving not less than ten Working Days' notice (14.2.2.2).
- The Client may also terminate the appointment of any Alliance Member that has breached the agreement if its breach has had an adverse effect on the Alliance, the Framework Programme, any Project or any Alliance Activities. This right appears to be dependent on the Alliance Member having been notified by another Alliance Member of the breach, the breach not having been remedied within ten Working Days of the notice, and the Core Group having met and issued recommendations (14.4).
- If an Alliance Member suffers an insolvency event then it ceases to be a party to the Agreement. If that Alliance Member is the only or last remaining Client, the appointment of all other Alliance Members 'shall automatically terminate' (14.3).
- A termination of an Alliance Member's appointment does not affect any Project Contracts (14.5). The Contract Terms do not explain what would be the status of any Order already issued, but the termination is stated not to affect any accrued rights (14.7): the parties who have signed the Order are likely still to be bound by it.

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8 Dispute avoidance and resolution

- Any Alliance Member that becomes aware of a dispute must give notice to all other Alliance Members involved and to the Alliance Manager. The Alliance Manager convenes a Core Group meeting at which the Alliance Members are required to make proposals seeking a solution (15.1).
- If the Core Group meeting does not achieve a solution, then the Alliance Members involved may refer the dispute to a Conciliation Procedure or to a Dispute Board, if these are indicated in the Framework Agreement (15.2). The Conciliation Procedure is outlined in Appendix 4, but the details of how the Conciliator will be appointed, and the rules to apply, must be set out by the parties. Similarly, the details of the Dispute Board rules and its members must be set out in the Agreement.
- If adjudication applies under the law of the country indicated in the Agreement, then any party may at any time refer a dispute to adjudication. The body that will appoint the Adjudicator and the rules to be used are to be entered in the Agreement. Appendix 4 sets out some requirements for the adjudication; for example, the Adjudicator must reach a decision within 28 Working Days of the date of referral.
- Clause 15.4 states that any dispute that is not resolved under clause 15.2 or 15.3 may be referred to arbitration. The Agreement, on the other hand, simply states that any dispute may be referred to arbitration – it is therefore unlikely that the reference to clauses 15.2 and 15.3 would be read as a strict pre-condition. It should also be noted that these are enabling provisions and not a binding arbitration agreement, ie it is not an agreement to use arbitration exclusively as the method for the final resolution of all disputes. It is an option, and it would still be open to a party to start court proceedings. Details of the arbitration rules, etc must be entered in the Agreement. Appendix 4 includes a joinder agreement, whereby all Alliance Members agree that they will arrange for all connected disputes to be dealt with by the same Arbitrator (Appendix 4 Part 3: 1).

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ACA FAC-1

This contract?

If considering using FAC-1, the following points should be borne in mind.

It combines the features of a framework arrangement with those of an alliancing agreement. As such, it sets up a system whereby the alliance members agree to work together to meet agreed objectives and targets.

All projects will be the subject of separate project contracts. The award procedures for these are set out in FAC-1, but the terms for the project contracts are not included and will need to be agreed between the relevant parties on the basis of template contracts identified in the schedules to FAC-1. Alliancing activities can also be commissioned through an order, in which case the terms of FAC-1 apply.

This is a complex arrangement, which requires the drafting of many additional documents, including the terms of each project contract, and the agreement of the scope and amounts to be paid under each order. FAC-1 is therefore only the starting point in securing the construction of a building project.

It nevertheless allows for parties to develop a collaborative relationship with agreed objectives and shared risks and rewards, and is probably most effective when the procurement of a series of similar projects is contemplated.

References and further reading

ACA Framework Alliance Contract (FAC-1)
ACA Term Alliance Contract (TAC-1)

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Royal Institute of British Architects

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The Royal Institute of British Architects (RIBA) has a long history of publishing construction contracts. It published its first contract, together with the London Builders' Society, in 1870 as the Heads of Conditions of Builders' Contract. A number of RIBA contracts were published between 1870 and 1931 when the RIBA, in conjunction with the National Federation of Building Trades Employers (NFBTE), established the Joint Contracts Tribunal (JCT). As a member of the JCT, the RIBA continues to be involved in the production of the JCT standard forms of contract. In 2014, the RIBA published its own standard forms, the RIBA Concise Building Contract and the RIBA Domestic Building Contract. The RIBA contracts can be used for design-bid-build (and with contractor's design) and for design-build projects.

RIBA Concise Building Contract 2018 (CBC18)

RIBA Domestic Building Contract 2018 (DBC18)

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RIBA CBC18 and DBC18

Royal Institute of British Architects

RIBA Concise Building Contract 2018 and Domestic Building Contract 2018 (CBC18 and DBC18)

These two contracts are for projects where the client engages consultants to provide all or the majority of the design, although they also allow for the contractor to design limited identified parts. They may be let on a lump sum or a measurement basis, and there is provision for requiring the contractor to appoint selected specialists. The forms include a number of optional clauses, which make them suitable for a surprisingly wide range of projects despite being relatively short. They are written in plain English and are appropriate for less experienced clients.

Background

In November 2014, the RIBA launched two new building contracts: the RIBA Concise Building Contract (CBC) and the RIBA Domestic Building Contract (DBC). These were intended to fill a market gap identified by RIBA members for shorter but flexible forms that were easy to use and which allowed for the appointment of a contract administrator. Following feedback from users, the contracts were revised in 2018, during which process some of the differences between the two versions were removed. The majority of the changes served to tidy up the drafting and regularise the clause numbering, but there were also a number of changes that significantly affected the content of the contracts, for example:

- checklists were added for completion by the user
- the requirement to hold progress meetings was removed
- provisions regarding confirmation of verbal instructions were removed
- interim and final certification and payment provisions were regularised so that they are the same in both contracts (eg pay less notices were added to DBC18)
- time bar provisions (ie provisions whereby the contractor loses a right if it fails to apply within a specified period) were removed
- detailed requirements for an optional programme and sanctions for non-production were removed
- the 'fit for purpose' option in relation to contractor design was removed
- a client cancellation form was added to DBC18.

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RIBA CBC18 and DBC18

Structure

Both contracts are relatively short (around 30 pages in total) and include guidance notes, a contract completion checklist, the agreement and contract details (to be completed by the parties), and the contract conditions comprising definition of terms, main clauses (13, with sub-clauses) and optional clauses (11 in CBC18 and nine in DBC18).

The optional clauses are important and add a great deal of flexibility to the form, including requirements for a programme, contractor design, required specialists, payment options and insurance backed guarantees. In the case of CBC18, the form also includes options for third party rights and warranties and public sector clauses and, in the case of DBC18, there is provision for the client to act as contract administrator and for the client to cancel the contract.

Use

According to its guidance notes, CBC18 is intended for use on 'all types of simple commercial building work'. It can be used in both the private and public sectors as it includes optional provisions dealing with official secrets, transparency, discrimination and bribery, which are normally required by public sector clients. CBC18 includes optional clauses that provide for advanced payment. It also includes an optional clause dealing with collateral warranties and third party rights.

Use of DBC18 is limited to 'work carried out on the Client's home', ie to contracts that fall under the 'residential occupier exception' in the Housing Grants, Construction and Regeneration Act 1996 (HGCRA), and the contract is endorsed by the HomeOwners Alliance. DBC18 has an option whereby the client may elect to act as contract administrator and a provision allowing the client to cancel the contract within 14 days of signing. In DBC18, adjudication is an optional provision whereas in CBC18 adjudication is stated to be a contractual right (ensuring compliance with the HGCRA).

Both contracts would be suitable for a wide range of projects, from very small-scale alterations and refurbishment works to moderately sized projects relating to existing or new buildings.

As CDC18 and DBC18 are so similarly structured, the points detailed below can be assumed to apply to both contracts unless indicated otherwise (see Table 10.1).

Synopsis

1 Roles

- The Parties to the Contract are the Client and the Contractor. Full details of both are entered in the Contract Details.
- The Parties agree that the Contractor will carry out the Works according to the Contract (which may include designing defined parts) and the Client will pay the Contractor the Contract Price (the Agreement).

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RIBA CBC18 and DBC18

Table 10.1: Key differences between CBC18 and DBC18

Title/subject	CBC18 clause	DBC18 clause	Notes
Agreement			DBC includes a note on cancellation
Contract details			
Client details	Item A	Item A	DBC does not allow for a registered company address
Dispute resolution	Item N	Item N	Differences in guidance, and in CBC adjudication is preselected
Client acting as contract administrator		Item T	DBC only
Advanced payment	Item T		CBC only
Collateral warranty/third party rights agreement	Item X		CBC only
Public sector clauses	Item Y		CBC only
Contract conditions			
Client's cancellation rights		12.11	DBC only
Negotiation or mediation	13.1	13.1	CBC refers only to mediation
Adjudication	13.2	13.2	An option under DBC, a right under CBC
Arbitration	13.8	13.4	Minor drafting differences
Legal proceedings/litigation	13.9	13.5	Minor drafting differences
Advanced payment	19		CBC only
Client acting as contract administrator		19	DBC only
Collateral warranty/third party rights agreement	23		CBC only
Public sector clauses	24		CBC only
Notice of cancellation		Appendix	DBC only

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RIBA CBC18 and DBC18

- Both Parties shall comply with all health and safety regulations (1.5 and 2.1.3). In addition, the Contractor is required to comply with all statutory obligations applicable to the Works (2.1.4).
- The Contractor must ensure that a suitably qualified representative is available during the Works to answer queries and receive instructions on its behalf (2.3).
- The Contract Details require the identification of an Architect/Contract Administrator and any other appointments made by the Client. The Client is required to inform the Contractor of any replacements (1.3).
- In DBC18 only, the Client may act as Contract Administrator under optional clause 19.
- Clause 5.1 clarifies the role of the Architect/Contract Administrator, stating it 'is not a Party to the Contract but administers the Contract, issuing instructions and certificates and taking decisions'.
- No role is assigned to any other person appointed by the Client under the Contracts. Any directions or information would need to be issued through the Architect/Contract Administrator.
- The Client may require the Contractor to sub-let work to Required Specialists (16), details of which must be set out in the Contract Particulars.
- No consent is required for subcontracting the Works, but the Contractor is responsible for the performance of all subcontractors, including Required Specialists (2.6).
- Neither Party may assign the Contract without the other's prior consent.

2 Documents

- The Contract Documents are defined as 'the Agreement, Contract Details, Contract Conditions and all documents listed as Contract Documents in item D of the Contract Details'. Item D suggests that these might include drawings, a pricing document, a specification and a contractor's design proposal.
- Inconsistencies 'in the Contract Documents and/or an instruction' are to be resolved by an instruction (5.9). Under clause 5.10, the Contractor is not entitled to any additional payment or time if the discrepancy is in any of the documents identified under item P (Contractor Design). This appears to be the case regardless of who prepared the document.
- There are optional provisions requiring the Contractor to provide an Insurance Backed Guarantee and a New Building Warranty (20 and 21).
- CBC18 contains optional provisions requiring the Contractor to enter into collateral warranties or third party rights agreements with identified persons or classes of person (23). Unless this option is selected (or, in the case of DBC18, the Contract states otherwise), third parties have no rights under the Contract (11.4).

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RIBA CBC18 and DBC18

3 Control: time

- A Start Date is entered in the Contract Details and the Client is required to provide access to the Contractor from the Start Date (1.1.2). All obligations regarding security, health and safety and insurance begin on that date.
- The Contractor is required to complete the Works by the Date for Completion stated in item E or item R (Completion in Sections) of the Contract Details (2.1.1).
- The Client has to allow access to the Contractor for carrying out the Works (1.2).
- If optional clause 17 is included, the Works can be divided into Sections, with separate start and completion dates, and separate rates of liquidated damages for each Section.
- The Client may defer access to the Site, or to specific Sections, but the Contract acknowledges that the Contractor may be entitled to a Revision of Time and costs that result from this (1.4).
- The Contracts contain an optional clause (14), which requires the Contractor to provide a programme. The programme must be provided no later than the pre-start meeting; however, there is no sanction for its non-production. If clause 14 applies, the Parties are required to set out in the Contract Details 'the activities the Contractor will carry out to complete the Works, the start and finish dates of each activity and the relationship of each activity to the others, which may include lead and lag times'.
- The Architect/Contract Administrator may issue instructions postponing the Works or Sections of the Works (5.4.2).
- The Parties must provide each other and the Architect/Contract Administrator with advance warning of any delaying event as soon as they become aware of it and must work together to resolve the event (3.2).
- The Contractor is required to take reasonable steps to minimise the effect of any delaying event (3.2.3).
- The Contractor may apply (with supporting documentation) for a Revision of Time if the Works are delayed by any of the events listed in clause 9.3 (which do not include adverse weather) and, if agreement cannot be reached, the Architect/Contract Administrator decides on an appropriate revision.
- The Contractor is required to calculate and submit details to the Architect/Contract Administrator of the effect of a change instruction on the Date for Completion (5.11). If the Contractor and Architect/Contract Administrator cannot agree the adjustment, or the Contractor fails to submit the calculation within seven days, then the Architect/Contract Administrator determines the adjustment (5.13).

4 Control: quality

- The Contractor must 'carry out and complete the Works in accordance with the Contract, in good and workmanlike manner' (2.1.1).

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RIBA CBC18 and DBC18

- The Contractor is required to ensure that 'a suitably qualified representative is available during the Works to answer queries and receive instructions on its behalf' (2.3).
- The Architect/Contract Administrator must issue the Contractor with 'any required changes and variations' to the Contract Documents (5.2).
- Where optional clause 15 is selected, the Contractor must use reasonable skill, care and diligence in preparing the design (15.1.1) and must ensure that its design is in accordance with the Client's specification (15.1.2).
- The Contractor is required to provide information regarding its design at least 21 days before carrying out the relevant Works (15.2). There are no procedures for approval of the design submissions.
- The Architect/Contract Administrator has the right to visit the Site and other off-site locations, and to inspect the Works (5.3).
- The Architect/Contract Administrator may issue instructions requiring any work to be uncovered, inspected and/or tested for compliance (5.5) and has the power to reject work that is not in accordance with the Contract (5.4.4).
- The Architect/Contract Administrator may issue an instruction that requires a change to the Works (5.4.1).
- The Contractor should notify the Architect/Contract Administrator within seven days of receiving an instruction if it believes that the instruction is not in accordance with the Contract or that implementing it would have adverse health and safety implications or would adversely affect any part of the Works designed by the Contractor (5.14).
- If the Contractor fails to comply with a notice requiring compliance with an instruction within seven days, the Client may engage others to carry out the instruction (5.8.1).

5 Control: cost

- The Contract Price is set out in item K of the Contract Details of both contracts. This can be either a lump sum or an amount calculated in accordance with the 'Pricing Document listed under item D', which would normally be a schedule of rates.
- Both contracts offer a choice between monthly certification based on the value of work completed, a single interim payment following practical completion and milestone payments. In addition, CBC18 offers the option of making an advanced payment.
- There is a range of mechanisms whereby the Contract Price may be adjusted, including contractor-proposed changes (3.4), instructions regarding tests (5.5.2), instructions requiring a change (5.11) and Client actions resulting in losses to the Contractor (9.7).

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RIBA CBC18 and DBC18

- There are no fluctuations clauses in either of the Contracts.
- The Contractor may make proposals to achieve a saving, which, if accepted following consideration by the Client, are instructed by the Architect/Contract Administrator (3.4). The saving is shared equally between the Client and the Contractor (3.5).
- The Contractor is required to calculate and submit details to the Architect/Contract Administrator of the effect of a change instruction on the Contract Price (5.11). If the Contractor and Architect/Contract Administrator cannot agree the adjustment, or the Contractor fails to submit the calculation within seven days, the Architect/Contract Administrator determines the adjustment (5.13).
- If an event attributable to the Client adds costs and expenses to the Works, the Contractor must inform the Architect/Contract Administrator and apply for an adjustment to the Contract Price 'within a reasonable time of its occurrence' (9.7). If the Contractor and the Architect/Contract Administrator cannot agree the adjustment, the Architect/Contract Administrator determines the adjustment (9.9). This provision is similar to the 'loss and expense' provisions in JCT contracts, except that the allowable events are not listed.
- CBC18 and DBC18 include several payment options. The default system is payment at monthly intervals, but there is also an optional clause (18) providing for milestone payments or for a single payment on Practical Completion. CBC18 contains a further optional clause (19) providing for 'Advanced Payment'.
- The Interim Payment Dates are monthly (unless some other period is entered in item K of the Contract Details) or, if the relevant option is selected, on achievement of specified milestones or on Practical Completion (7.1).
- The Contractor may send the Architect/Contract Administrator an application for payment no later than seven days before each Interim Payment Date (7.2). The application must comply with clause 7.5 (eg state the value of work completed, adjustments to the Contract Price, retention, etc).
- The Architect/Contract Administrator must send the Parties a Payment Certificate which complies with the requirements of clause 7.5 no later than five days after each Interim Payment Date (7.3). The Contract allows for the certificate to show a payment from the Contractor to the Client (7.5.6).
- If the Architect/Contract Administrator does not issue a certificate within the required time, any payment application issued by the Contractor will become a Payment Notice, or the Contractor may issue a payment application (7.4).
- The Client or the Contractor may issue a 'Pay Less Notice' not later than five days before the Final Date for Payment (7.9). The Client or Contractor must then pay the amount due on the application or certificate, or the Pay Less Notice. The Contracts state that 'the Final Date for Payment of an interim payment and the final payment shall be 14 days after the relevant payment due date' (7.7).

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6 Insurance

- The insurable risks that each Party accepts are listed in clauses 6.1 and 6.2, with the Client accepting liability for damage to existing structures and neighbouring property caused by the carrying out of the Works, in so far as the event has not been caused by the Contractor. The Contractor is liable for a range of matters, including loss or damage to the Works, death or harm to employees and any other loss or damage that is not the liability of the Client.
- Each Party is responsible for arranging the insurance that is stated to be its responsibility in item J of the Contract Details, for the amounts stated and for keeping it in place until Practical Completion. The Contractor is required to give assurances to the Client that any Required Specialists have adequate insurance in relation to their portion of the Works.
- If evidence of insurance is not provided by either Party, then the Architect/Contract Administrator is required to notify the other Party, which must take out the required insurance and the Contract Price is adjusted accordingly.

7 Termination

- If the Contractor commits specified defaults (including failure to proceed regularly and diligently and committing a Material Breach) then the Architect/Contract Administrator may issue the Contractor with a notice of intention to terminate, stating the reason (12.1). If the Contractor fails to remedy the default within 14 days, the Architect/Contract Administrator may terminate the Contractor's employment by issuing a notice (12.2).
- If the Client is in Material Breach, then the Contractor may issue a 14-day notice of intention to terminate, stating the reason (12.3). If the Client fails to remedy the default within 14 days, the Contractor may terminate its employment by issuing a notice (12.4).
- Either Party may terminate the Contractor's employment if the other Party is insolvent (12.5) or if the Works are suspended for a continuous period of 60 days due to an event not caused by either of the Parties (12.6).

8 Dispute avoidance and resolution

- The Parties may, in the first instance, attempt to settle any dispute by mediation (CBC18) or by negotiation or mediation (DBC18), as specified in item N of the Contract Details (13.1).
- In addition, either Party may give notice at any time of its intention to refer a dispute or difference to an Adjudicator (13.2). Referral of the dispute to an Adjudicator shall be made within seven days of the issue of the notice and the Parties may agree who shall act as the Adjudicator or either Party may apply to the nominating body specified in item N to appoint an adjudicator (13.2). In the case of CBC18, the

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RIBA CBC18 and DBC18

adjudication is to be in accordance with the Scheme for Construction Contracts (England and Wales) Regulations 1998. In the case of DBC18, if the option to use adjudication was selected at the time of signing the contract, the adjudication is to be in accordance with the RIBA Adjudication Scheme for Consumer Contracts (item N).

- The Parties select whether arbitration or litigation is to be the final method of dispute resolution (item N).
- Section 13 contains references to the nominating body specified in item N of the Contract Details. However, it should be noted that item N allows for the name of the mediator, adjudicator and arbitrator to be entered, but not the name of the nominating body.

This contract?

If considering using CBC18 or DBC18, the following points should be borne in mind.

Item N allows for the name of the mediator, adjudicator and arbitrator to be entered, but not the name of the nominating body. The item states that 'selection [of mediator/adjudicator/arbitrator] can be made by the Royal Institute of British Architects'.

In order to avoid ambiguity, it would be sensible for the parties to confirm they have agreed that the Royal Institute of British Architects *shall* make the necessary selection or, if preferred, state an alternative nominating body for each alternative dispute resolution appointment.

References and further reading

RIBA Concise Building Contract 2018 (February 2018)
RIBA Domestic Building Contract 2018 (February 2018)

Lupton, S. *Guide to RIBA Domestic and Concise Building Contracts 2018*, London: RIBA Publishing (2018)

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JCLI 11

JCLI was founded in 1973 as the Joint Council for Landscape Industries. Between 2004 and 2010 it went under the name Joint Committee for Landscape Industries with a slightly different mission. In 2010, the Landscape Institute formed the JCLI Contracts Forum with the aim of continuing and developing the JCLI contracts. 'JCLI' is no longer treated as an acronym. The JCLI documents are produced by individual member organisations but agreed by JCLI and carry the JCLI badge.

JCLI Landscape Works Contract 2017 (LWC 2017)

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JCLI LWC 2017

JCLI

JCLI Landscape Works Contract 2017 (LWC 2017)

The contract is a bipartite agreement between an employer and a contractor, with a landscape architect/contract administrator appointed to administer the terms. It is intended for new landscape work, for both soft and hard landscaping, where there is no design input by the contractor (for that scenario, the alternative JCLI Landscape Works Contract with Contractor's Design 2017 should be considered). LWC 2017 can be used by either private or public sector clients. It is a lump sum contract with provision for bills of quantities, if required. There are no provisions for naming or nominating client-selected subcontractors.

Background

The JCLI originally had two standard forms for landscape works based on JCT63 Standard Building Contract With and Without Quantities. In 1978, these were replaced by a single form modelled on the, then current, JCT Minor Works Agreement 1968. Their new form adopted a section-headed format (two years ahead of the JCT) and incorporated additional clauses of specific relevance to landscape works. These included such matters as the failure of plants, malicious damage and theft, and additional retention to cover plants which were dead at practical completion. The form also contained provisions for partial possession, prime cost sums, objections to nomination, delays by the employer and full fluctuations, none of which were included in the JCT Minor Works form. This form was considerably revised in 1987, again in 1989, and in 1998 to take account of the provisions of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA). Two further revisions followed, in 2002 and in 2012, by which point there were three contracts in the suite, one with no design responsibility for the contractor, one with contractor's design and the third for maintenance works.

The three forms were revised in 2017. The changes were not fundamental but involved revisions to incorporate public sector provisions (similar to those added to JCT forms) and other updates, such as those to take account of the CDM Regulations.

Structure

LWC 2017 is a relative short contract, totalling 46 pages including schedules. The agreement is at the front, followed by the recitals and the contract particulars and there is provision for execution either under hand or as a deed. The conditions cover 16 pages and are divided into seven sections, detailing definition and interpretation, carrying out the works, control of the works, payment, injury, damage and insurance, termination and settlement of disputes.

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There are three schedules dealing with arbitration, fluctuations and the supplemental provisions (which are similar to the JCT standard supplemental provisions). There are several pages of helpful guidance notes at the back of the form.

Use

LWC 2017 is intended for the construction of new landscape work, both soft and hard landscaping. JCLI also publishes a Landscape Maintenance Works Contract 2017 (LMWC 2017) for use where the landscape contractor is to be responsible for the care of plants, trees, shrubs and grass after practical completion. LMWC 2017 is suitable for contracts of a simple nature where the design work is to be undertaken by the employer or its consultant.

Where named specialists or detailed control procedures are required, LWC 2017 may not be suitable for use. Also, where the contractor is to design discrete parts of the works, it is recommended that the Landscape Works Contract with Contractor's Design 2017 should be considered.

Synopsis

1 Roles

- The Parties to the Contract are the Employer and the Contractor, who are identified in the Agreement.
- The Contractor's primary obligation is to carry out and complete the Works in a proper and workmanlike manner in accordance with the Contract Documents (2.1). There is no obligation for the Contractor to undertake any design.
- The Contract requires that a Landscape Architect/Contract Administrator is appointed to administer its terms. The Landscape Architect/Contract Administrator is identified in Article 3 and a footnote indicates that the appointee must be a suitably qualified person. If that person ceases to act, the Employer must appoint a replacement within 14 days.
- The Landscape Architect/Contract Administrator's role is defined in clause 2.3 as 'to issue any further information and instructions necessary for the proper carrying out of the Works and all certificates required by the Contract'.
- There is no defined role for a quantity surveyor or any other professional.
- Where the CDM Regulations apply, Article 4 identifies the Principal Designer, the default position being the appointment of the Landscape Architect/Contract Administrator as the Principal Designer, unless another person is appointed to the role.
- Article 5 provides, as the default position, that the Contractor is appointed as the Principal Contractor if the CDM Regulations apply; however, there is an option to appoint another person to the role.

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- The Contractor is required to complete the works in accordance with the Construction Phase Plan, to comply with all Statutory Requirements and to give all notices required by Statutory Requirements (2.1).
- The Contractor is to pay all fees required under the Statutory Requirements. Such fees will not be refunded by the Employer except where there is an agreement to this effect by the Parties (2.6).
- The Parties agree to comply with their roles under the CDM Regulations (3.9). Also, the Employer is to notify the Contractor of the name and address of any new CDM Coordinator and Principal Contractor that may be appointed by the Employer to replace those named under the Contract Particulars.
- The Contractor is not expected to sub-contract any part of the Works without the consent of the Landscape Architect/Contract Administrator, which may not be unreasonably withheld or delayed. However, a Contractor who sub-contracts remains liable to carry out all of the Works in accordance with the Contract, the instructions of the Landscape Architect/Contract Administrator and in keeping with the Statutory Requirements (3.3.1).
- The Contract provides some conditions for sub-contracting, including that the sub-contract terminates on the termination of the main Contract with the Employer, that the Parties shall comply with the CDM Regulations where applicable and that, where the final date for payment under the sub-contract has been missed without payment, the Contractor shall, in addition to the outstanding sum, be liable to pay interest at a rate equivalent to that set out in the main Contract.
- Rights of third parties under the Contracts (Rights of Third Parties) Act 1999 are specifically excluded, except as provided for in the Contract (1.5).

2 Documents

- The Recitals are used to set out a brief description of the Works and the documents which contain the Employer's design. They also confirm that the Contractor has provided the Employer with either the priced Contract Specification or Work Schedules or Schedule of Rates.
- The Contract Particulars are used to define the project and project expectations in more detail. The Contract Particulars are to be used to specify the date for commencement of the Works, the Date for Completion, liquidated damages provision and the Rectification Period.
- Article 2 of the Contract Particulars allows the Parties to set out the Contract Sum while Article 4 is to be used to name the appointed Landscape Architect/Contract Administrator.
- The Contract is to be read as a whole; however, priority is given to the Conditions and the Agreement over other contract documents, including drawings, Contract Specification and any Framework Agreement (1.2).

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- The definition of 'day' excludes public holidays but includes Sundays. Where a period of specified days is to be reckoned from a particular date, the period shall begin a day after this date (1.4).
- The default position is for the law of England to govern the Contract. The footnote advises that changes may be made to suit another jurisdiction if the Contract is to be used outside England and Wales (1.8).
- All instructions are to be in writing and are properly served when delivered to the address that the Parties set out in the Agreement or an alternative address notified by a Party. Where the address of a Party is unknown, service will be deemed to have been achieved when a communication is delivered to the last known address or, in the case of a company, to the registered or principal office (1.6).
- Instructions are to be issued in writing by the Landscape Architect/Contract Administrator. Where oral instructions are issued they are to be confirmed within two days by the Landscape Architect/Contract Administrator (3.4).
- Where an instruction has not been promptly implemented by the Contractor and if, after seven days of receipt of a notice from the Landscape Architect/Contract Administrator, the Contractor fails to comply with the instructions, the Employer is entitled to employ other persons to carry out the instructions and the costs of such engagement would be charged to the Contractor (3.5).
- Where the Contractor becomes aware of any divergence between the Statutory Requirements and the provisions of the Contract Documents or instructions of the Landscape Architect/Contract Administrator, the Contractor is to issue a notice to the Landscape Architect/Contract Administrator stating the divergence (2.5.1). To the extent that the Contractor keeps to the provisions of 2.5.1, it shall not be liable for any inconsistencies between the Works and the Statutory Requirements where the Works have been constructed in compliance with the Contract Documents or instructions from the Landscape Architect/Contract Administrator (2.5.2).
- Any inconsistency in Contract Documents provided by the Employer (Contractor Drawings, Contract Specifications and Work Schedules) shall be corrected by the Landscape Architect/Contract Administrator and, where it leads to an omission or addition, it shall be treated as a variation (2.4).
- Neither Party shall, without the consent of the other, assign the Contract or its rights under it (3.1).

3 Control: time

- The Works are to commence and be completed on the dates stated in the Contract Particulars (2.2). The Landscape Architect/Contract Administrator is to issue all instructions necessary for the project to progress, as well as all certificates required under the Contract. There is no provision for sectional completion.

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- The Contractor is to notify the Landscape Architect/Contract Administrator at any time when it becomes apparent that the Date for Completion set out in the Contract will not be met. The Landscape Architect/Contract Administrator is to grant the Contractor an extension of time where the reason for delay is beyond the Contractor's control (including instructions by the Landscape Architect/Contract Administrator that were not given because of a default by the Contractor but which have resulted in delay) (2.7).
- Circumstances that are under the control of the Contractor include any default by the Contractor, including default of those employed or engaged by the Contractor, and these shall not entitle the Contractor to an extension of time (2.7).
- Where completion has not been achieved by the Contractor on the Date for Completion as set out in the Contract Particulars (and amended from time to time by extensions of time under 2.7), the Employer shall have the right to levy liquidated damages on the Contractor at the rate set out in the Contract Particulars. The liquidated damages shall be levied from the Date for Completion (which was not met) until practical completion is achieved. The liquidated damages may be deducted from the monies due to the Contractor after the service of the relevant notices or recovered as a debt (2.8).
- Where the Employer wants to take possession of a section of the Works before practical completion, the Employer is to do so with the consent of the Contractor, which shall not be unreasonably withheld. Before such takeover of possession, it is expected that the Parties would have confirmed with their insurers that such possession will not prejudice the insurance. The date of possession of the Relevant Part by the Employer shall be the Date for Completion of the Relevant Part and the Contractor will be expected to have complied sufficiently with its duty under the CDM Regulations in relation to a health and safety file for the Relevant Part. Also, liquidated damages for the project as a whole will be reduced by a value equal to the value of the Relevant Part (2.12).

4 Control: quality

- The Contractor is to carry out and complete the Works in a proper and workmanlike manner, in accordance with the Contract and complying with all Statutory Requirements, including the issue of notices where required. Where the Contract provides that materials or standards of workmanship are to be a matter for the Landscape Architect/Contract Administrator's approval, such quality and standards are to be to its reasonable satisfaction (2.1).
- The Contractor is expected to ensure that a competent person is on site at all reasonable times to receive instructions given by the Landscape Architect/Contract Administrator. Any instructions given to that person shall be deemed to have been given to the Contractor (3.2).

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- The Landscape Architect/Contract Administrator may issue an instruction to exclude from the site any person employed on it, provided that such instruction is given fairly and reasonably (3.8).
- The Landscape Architect/Contract Administrator is entitled to issue instructions varying the Works (3.6.1).
- Practical completion is said to have been achieved when, in the reasonable opinion of the Landscape Architect/Contract Administrator, the Contractor has fulfilled its duties under the CDM and other regulations (2.9).
- There are two alternatives dealing with the management of defects and establishment care of plants by the Contractor. Both provide that, in the event of defects, shrinkages and other faults, the Landscape Architect/Contract Administrator shall inform the Contractor not later than 14 days after the expiry of the Rectification Period and the Contractor shall repair the fault at its own cost. However, the provisions differ in that 2.10A provides for a separate agreement with the Contractor to manage the care for trees, shrubs and other plants after practical completion, while 2.10B provides that the Employer shall care for the trees, shrubs and other plants after practical completion and will bear the cost of the replacement of defective trees.

5 Control: cost

- This is a lump sum contract and the figure is exclusive of VAT (4.1).
- Calculation of payments under this Contract are exclusive of VAT, which shall be paid as appropriate (4.1).
- It is expected that Provisional Sums in the Contract are be extended to cover theft and malicious damage not within the control of the Contractor that occur before practical completion (2.13).
- The price for carrying out variation instructions is to be agreed with the Contractor. In the absence of an agreement on the price for carrying out the varied work, the Landscape Architect/Contract Administrator is entitled to value the works reasonably using information provided in the priced Contract Specification, Works Schedule or Schedule of Rates. Such assessment is expected to include loss and/or expense incurred due to the disruption to the Contractor's schedule in carrying out the variation instruction (3.6).
- The due dates for interim payment up to practical completion shall be dates occurring at four-week intervals from the date of commencement. Within five days of the due date, the Landscape Architect/Contract Administrator is required to issue an interim certificate of the amount due to the Contractor on the relevant due date and the basis of its calculation. The Contract stipulates that the calculation should take cognisance of work properly executed to date and materials and goods that have been properly brought to site for the purpose of the Works and discount from the cost of these the total of all sums stated in previous interim certificates, the total

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of all sums notified on any Contractor payment notices as may be varied by any 'pay less notice' and the total difference 'between a Valuation on a notice given against an interim certificate under clause 4.5.4 and the Valuation on the relevant interim certificate' (4.3).

- Following practical completion, the due date for interim payment is seven days after practical completion and the Landscape Architect/Contract Administrator is expected to issue an interim payment certificate not later than five days after the due date (4.4). Following this, the due dates for interim payments are at three-month intervals from the date of practical completion up to the expiry of the Rectification Period.
- The final date for payment on all interim certificates shall be 14 days from the due date (4.3, 4.4).
- Subject to any 'pay less notice' to be issued by the Landscape Architect/Contract Administrator, the sum to be paid on the final date for payment is the sum stated on the interim certificate (4.5.1).
- If the Landscape Architect/Contract Administrator fails to issue an interim certificate five days after the due date, the Contractor, after the expiration of the five-day period, may issue a payment notice to the Landscape Architect/Contract Administrator (with a copy to the Employer) stating the sum that the Contractor considers to be due at the relevant due date and the basis for its calculation, taking into consideration the outline of calculation set out in clauses 4.3 and 4.4 (4.5.2).
- Where the Contractor issues a payment notice, the final date for payment is postponed by the number of days after the five-day period that it took the Contractor to issue the payment notice (4.5.3).
- If the Employer intends to pay less than the sum stated on either the interim certificate or the Contractor's payment notice, the Landscape Architect/Contract Administrator shall issue a 'pay less notice' stating the Employer's intention not later than five days before the final payment date. The notice shall state the sum that the Employer considers to be due to the Contractor at the date of the notice. The sum stated on the notice shall be the sum paid on the final payment date (4.5.4).
- Where the Employer fails to make payment on the final payment date, the Contractor shall be entitled to interest on the overdue amount at the rate of 5 per cent over the dealing rate of the Bank of England current at the date when the payment becomes overdue. Payment of the interest stated above does not preclude the Contractor from its rights to the full sum or from claiming other rights arising from such default (4.6).
- The Contractor shall have a right to suspend performance of some or all of its duties on the failure of the Employer to keep to its payment obligations. Such right may only be activated after a seven-day notice to the Employer of the intention to

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suspend and the reason for such suspension. After the expiry of the seven-day notice, if the situation is not remedied, the Contractor may suspend performance of its obligations (4.7.1).

- Reasonable costs and expenses incurred as a result of such suspension are to be paid by the Employer (4.7.2) and applications in respect of such costs are made to the Landscape Architect/Contract Administrator and are to be included in the next and subsequent interim certificates.
- Within the period stated in the Contract Particulars, the Contractor is to provide the Landscape Architect/Contract Administrator with all necessary documents for the calculation of the final payment. The due date for final payment shall be 28 days after the receipt of the documents or, if later, the date stated in the certificate of making good under clause 2.11 (4.8.1). Not later than five days after the due date, the Landscape Architect/Contract Administrator shall issue the final certificate, stating the amount due, the Party to whom it is due and how the sum was calculated.
- The final date for payment of the final payment is 14 days from the due date (4.8.2).
- If the Party who is expected to make the final payment intends to pay less than the certified sum, the Contractor or the Landscape Architect/Contract Administrator on behalf of the Employer issues a notice of its intention to pay less not later than five days before the final date for payment. The notice is to state the sum due and how it was calculated. The amount stated in the 'pay less notice' becomes due on the final payment date (4.8.3).
- Where a final certificate is not issued in accordance with the Contract, the Contractor may, after the expiration of the five-day period, issue a final payment notice to the Landscape Architect/Contract Administrator, with a copy to the Employer, stating the sum that it considers to be due and the basis for its calculation. The final date for payment is consequently postponed by the number of days that it takes the Contractor to issue the final payment certificate (4.8.4).
- If the Employer (or Contractor) intends to pay less than the sum stated in the final payment certificate, it may issue a notice (pay less notice) under clause 4.8.3, stating the amount that it considers to be due and the basis for its calculation; this amount then becomes the amount to be paid on the final payment date.
- Where no 'pay less notice' is issued, the payer will be liable to pay the sum stated in the final certificate or final payment notice (4.8.5). Failure to pay the amount on the final payment date attracts interest on the overdue sum (4.9).

6 Insurance

- Except for personal injury or death arising from the negligence of the Employer or persons employed or engaged by it, the Contractor indemnifies the Employer against all costs and expense in respect of personal injury or death of any person arising during the course of the Works or caused by carrying out the Works (5.1).

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Liability on similar terms is placed on the Contractor for injury or damage to property (5.2). The Contractor is expected to take out and maintain insurance to cover the liability stated in clauses 5.1 and 5.2 (5.3). Where clause 5.4B applies, the Contractor's liability excludes loss or damage to existing structures and there is an equivalent limitation in clause 5.4D.

- There are four options for insurance of the Works: if the Contract Particulars choose clause 5.4A, the Contractor is to take out and maintain 'all risks' insurance with insurers approved by the Employer in a joint names policy. The policy is to cover the full reinstatement value of the Works plus a percentage for professional fees. The insurance is to be in place until practical completion or termination by the Employer, whichever occurs first (5.4A).
- In the alternative clause 5.4B, the Employer is to take out and maintain the joint names insurance policy to cover existing structures and contents owned for the full cost of reinstatement up to practical completion following damage caused by Specified Perils (5.4B.1). The Employer is also to take out and maintain a joint names insurance policy for the Works, including a percentage for professional fees (5.4B.2). The Contractor is to authorise all payments to be made to the Employer in the event of damage (5.6.3).
- The third option is for the Employer to maintain insurance of the existing structures against damage by Specified Perils in its own name (5.4C).
- The fourth option is for the Parties to set out their own requirements as to insurance in the Contract Particulars (5.4D).
- Whichever Party maintains the insurance, it is expected to produce evidence of the same on reasonable request by the other Party (5.5).
- Where damage occurs, the Contractor shall authorise that payment should be made to the Employer and shall pursue the restoration of the damaged work with all due diligence (5.6).

7 Termination

- Section 6 sets out the different instances of insolvency relevant for termination (6.1).
- Notice of termination is not to be unreasonably issued. Termination is to take effect on receipt of notice and such notice or notices are to be delivered by hand or sent by recorded, signed for or special delivery post (6.2).
- Irrespective of the grounds of termination, the Contractor may be reinstated on terms agreed by the Parties (6.3).
- Where the Contractor defaults by failing to carry out the Works diligently, or by suspending all or substantial aspects of the Works without reasonable cause and/or fails to comply with its duties under the CDM Regulations (6.4.1), the Employer may issue the Contractor with a seven-day notice to rectify the specified default. If this

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fault is not rectified within that period, the Employer may, by a further notice within ten days of the expiration of the seven-day notice, terminate the Contractor's employment (6.4).

- In the event of the insolvency of the Contractor, the Employer may, by notice at any time, terminate the employment of the Contractor (6.5). As from the date of insolvency the Contractor is relieved of its obligation in Article 1 to carry out and complete the Works and all payments from the Employer to the Contractor are restricted in accordance with the provisions of clauses 6.7.2 to 6.7.4. The Employer may take reasonable steps to secure the Site and materials on site on termination (6.5.2).
- The Employer is also entitled to terminate by notice on the grounds of corruption (6.6).
- The Employer may terminate if the grounds set out in regulation 73(1)(a) or 73(1)(c) of the Public Contracts Regulations 2015 apply (6.10.3).
- If the Contractor's employment is terminated under clauses 6.4, 6.5 or 6.6, the Employer may take possession of the Site and may engage others to complete the Works. No further sums shall be due to the Contractor other than amounts under clause 6.7.4; and no outstanding sum shall be due for payment if the Landscape Architect/Contract Administrator has issued the relevant 'pay less notice' under clause 4.5.4, or if the Contractor has become insolvent after the last date that the notice should have been given (6.7.2).
- After the completion of the Works and the making good of defects or instructions (according to 2.10A or 2.10B), the Landscape Architect/Contract Administrator shall, within three months, issue a certificate (or, in the alternative case, the Employer shall issue a statement). The certificate/statement shall calculate the loss and expenses incurred by the Employer arising out of employing other persons to complete the Works, securing the Site and any other direct loss and/or damage arising as a result of the termination and other losses for which the Contractor is liable. Added to this amount should be the total amount of payments made to the Contractor. The sum of these two headings is then subtracted from the total amount agreed by the Parties as the Contract Sum (6.7.3).
- Where the agreed Contract Sum is less than the expenses incurred by the Employer, the difference shall be a debt payable by the Contractor to the Employer, and vice versa (6.7.4).
- The Contractor's right to terminate is dependent on defaults by the Employer and the Landscape Architect/Contract Administrator. Such defaults include: failure to pay by the final date for payment the amount due in accordance with clause 4.5 and/or any VAT properly chargeable on such amount; interference with the issuance of any certificate due under the Contract; failure to fulfil its responsibilities under the CDM Regulations; suspension for a continuous period of one month or more due to

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the Landscape Architect/Contract Administrator's instructions on inconsistencies in any Contract Document provided by the Contractor; or any impediment or prevention or default by the Employer, Landscape Architect/Contract Administrator or persons engaged by the Employer (6.8.1 and 6.8.2) (the clause excludes force majeure events, actions of statutory authorities, loss or damage due to Specified Perils and civil commotion, among other causes as specified in clause 6.10).

- On the occurrence of the default outlined in clauses 6.8.1 and 6.8.2, the Contractor is entitled to give the Employer a notice specifying the defaults. If, seven days after the receipt of the notice, the default continues, the Contractor may, by another notice issued within ten days of the expiry of the seven days, terminate the Contract (6.8.3).
- The Contractor may terminate by notice in the event of the Employer's insolvency. On the Employer's insolvency, the Contractor's obligation under Article 1 to carry out and complete the Works is suspended (6.9).
- Either Party may terminate if work is stopped for a continuous period of one month or more because of force majeure (an act of God, ie natural disasters such as flash flooding), Landscape Architect/Contract Administrator instructions on inconsistent documents and/or variation which is a result of the negligence of the undertaker, loss and damage occasioned by Specified Perils (which are defined in Section 1 of the Contract and include fire, lightning, earthquake, etc), civil commotion and/or threat of terrorism, and the exercise of statutory powers by the government which affects the execution of the Works. On the occurrence of any of the above events, either Party may, upon the expiry of the one-month suspension period, give notice that, unless the suspension ceases within seven days of the receipt of the notice, it will terminate. Failing the cessation of suspension after the seven-day period, the notifying Party may by further notice terminate the Contract (6.10.1).
- The Contractor is precluded from giving notice under the Specified Perils provision where the loss or damage to the Works occasioned by the Specified Perils was due to the negligence and/or default of the Contractor or those engaged by it (6.10.2).
- On termination either on the Employer's default (including insolvency) or for reasons beyond the reasonable control of the Parties (force majeure, Specified Perils, the exercise of statutory powers), the Contractor shall prepare an account setting out the total value of work properly executed at the date of termination, all amounts due to the Contractor under the Contract and the costs of materials and goods properly ordered for the Works which the Contractor has paid or is bound to pay (6.11.2.1 and 6.11.2.2).
- Where the termination was due to the Employer's default (including insolvency) and also where the termination is under clause 6.10.1.3 and the loss or damage was caused by the negligence of the Employer or those engaged by it, the account should also include any direct loss and/or damage caused by the termination (6.11.3).

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JCLI LWC 2017

- With due consideration to the amounts previously paid to the Contractor, the Employer is to pay any outstanding amount on the account within 28 days of the receipt of the account. Any payment with respect to site materials is based on the materials becoming the property of the Employer (6.11.4).

8 Dispute avoidance and resolution

- Articles 6–8 deal with dispute resolution. An acknowledgment of each Party's right to refer any dispute to adjudication is recognised under Article 6; Article 7 provides that, if selected in the Contract Particulars, arbitration will be the final tribunal for settlement, adopting the JCT 2016 edition of the Construction Industry Model Arbitration Rules. Issues relating to the Construction Industry Scheme or VAT, as well as disputes over the enforcement of an adjudicator's decisions, are to be excluded from the terms of reference for the arbitration panel.
- Article 8 provides for legal proceedings in court, both as a necessary solution for resolving issues specifically excluded from arbitration as noted above and also as an alternative to arbitration.
- Section 7 is concerned with the settlement of disputes. The mediation clause presupposes negotiation between the Parties that has been unsuccessful and advises the Parties to seriously consider mediation, if suggested by either Party (7.1).
- The Contract adopts the JCT style of allowing its adjudication procedure to be determined by the statutory Scheme for Construction Contracts (7.2).
- Where the Contract Particulars indicate Arbitration as the final tribunal, an appropriate procedure is set out in Schedule 1 of the Contract (7.3).

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JCLI LWC 2017

This contract?

If considering using LWC 2017, the following points should be borne in mind.

It is intended for new landscape work, for both soft and hard landscaping. It is for use in either the private or public sector. There is provision for bills of quantities. The employer must appoint a landscape architect or a contract administrator. The contract covers work up to practical completion but maintenance is a matter for the JCLI Landscape Maintenance Works Contract 2017. If landscape design by the contractor is needed, the alternative JCLI Landscape Works Contract with Contractor's Design 2017 should be considered.

There is provision for phased completion, partial possession, nomination of subcontractors and clauses dealing with the failure of plants, malicious damage or theft, and the provision of care for plants, etc following practical completion. The form is drafted to include compliance with the CDM Regulations, although it is envisaged that some contracts let under it may not fall within the coverage of this legislation, and it also complies with the HGCRA, as amended.

When completing the form, decisions are required relating to insurance of the works, damages for non-completion and post-practical completion care.

If acting as contract administrator, a non-expert in landscape operations might experience difficulties regarding the provisions for practical completion, defects liability obligations and staggered release of retention. The procedural rules in general are straightforward but if LWC 2017 is used in parallel with building work being carried out on the same site by a principal contractor, care should be exercised over the coordination of contract periods, defects liability periods, health and safety documents, indemnity and insurance.

The wording of the conditions generally follows that of the JCT form MW16 and therefore the structure, language and terminology will be familiar to many.

References and further reading

JCLI Landscape Works Contract 2017
JCLI Landscape Works Contract with Contractor's Design 2017
JCLI Landscape Maintenance Works Contract 2017

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Scottish Building Contract Committee 12

The Scottish Building Contract Committee (SBCC) was established in 1964 with the principal aims of developing closer contact with central bodies in London and the appointment of a working party in Scotland. The SBCC has been a member of the Joint Contracts Tribunal (JCT) since 1966 and is responsible for the adaption of JCT documents for use in Scotland and for the drafting of suitable documentation for use under Scots law.

SBCC Standard Building Contract with Quantities for use in Scotland 2016 (SBC/Q/Scot16)

SBCC Minor Works Building Contract for use in Scotland 2016 (MW/Scot16)

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SBCC SBC/Q/Scot16, SBCC MW/Scot16

Scottish Building Contract Committee

SBCC Standard Building Contract with Quantities for use in Scotland 2016 (SBC/Q/Scot16)

SBCC Minor Works Building Contract for use in Scotland 2016 (MW/Scot16)

These contracts, which are intended for use in Scotland, are essentially adaptations of the JCT SBC16 and the JCT MW16, incorporating amendments to take account of Scots law. SBC/Q/Scot16 is intended for large-scale projects and can be used by public and private sector clients. It requires the employer to appoint a contract administrator and provides for the contractor to complete the design of identified parts (the 'Contractor's Designed Portion' or CDP) of the works. The employer may require the contractor to use particular subcontractors through listing options or naming specialists. A key difference to SBC16 is the replacement of the provisions for payment for off-site materials. It also includes clauses relevant to public sector procurement, dealing with matters such as confidentiality, corruption and the use of a building information modelling (BIM) protocol. MW/Scot16 is intended for small, straightforward projects, and is very similar to MW16. However, unlike MW16, it contains references to a bill of quantities, allows for the appointment of a quantity surveyor and contains provisions for named specialists. For both contracts, arbitration is the default mechanism for the final resolution of disputes, although the parties may select litigation as an alternative (in SBC16 and MW16 litigation is the default).

Background

Scots law, for historical reasons, differs markedly from the law of England and Wales. Also, with the establishment of the Scottish Parliament, not all laws made by the Westminster Parliament of Great Britain and Northern Ireland apply to Scotland. The sources of law in Scotland are not the same as those in England, and the influence of Roman and canon law over time has resulted in a unique legal system, courts structure and distinctive terminology. Close continental links in the past have also helped to produce what one commentator has described as an 'intermediate between Civil law and Common law'.

There are, nevertheless, many similarities between the jurisdictions and certain legislation, such as the Housing Grants, Construction and Regeneration Act 1996 (HGCRA), applies equally in both. However, it is important that all parties take account of the significant differences in legislation and in the law relating to property, delict (broadly speaking, the equivalent of the English law of tort) and, of course, contract.

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SBCC SBC/Q/Scot16, SBCC MW/Scot16

In the past, building contracts in Scotland were often based on an exchange of letters rather than formal documents and were direct trades contracts. The Emmerson Report of 1962 highlighted the different circumstances in Scotland and concluded that the existing trade-by-trade basis was unsuitable for main contracting in the building industry. It recommended that closer links should be established with London and the appointment of a working party in Scotland, which resulted in the establishment of the McEwan Younger Committee. A report from that committee, initiated by the Royal Incorporation of Architects in Scotland, resulted in the formation of the Scottish Building Contract Committee (SBCC) in 1964. The SBCC has now been restructured as a limited company. The SBCC Ltd board is advised by a Consultative Committee drawn widely from representative bodies within the building industry in Scotland as follows:

- Royal Incorporation of Architects in Scotland
- Scottish Building Federation
- Royal Institution of Chartered Surveyors in Scotland
- Scottish CASEC
- Convention of Scottish Local Authorities
- National Specialist Contractors' Council – Scottish Committee
- Association of Consulting Engineers (Scottish Group)
- Scottish Executive, Building Division
- Law Society of Scotland
- Association of Scottish Chambers of Commerce.

These constituent bodies obviously represent a wide cross-section of the industry compared, for example, with the composition of the board of the JCT.

The Banwell Report, issued in March 1964, included a recommendation that 'a common form of contract for all construction work, covering England, Scotland and Wales, [was] both desirable and practicable'. Implementation of this report's recommendations resulted in the JCT inviting the SBCC to join the Tribunal, and this invitation was accepted in 1966 'subject to the right of the SBCC to issue Tribunal forms in a manner which conformed with Scots law and practice'.

The SBCC is therefore primarily responsible for the adaptation of JCT documents for use in Scotland. It is also responsible for amending and publishing such forms, advising on the interpretation of these contracts, promoting best practice, drafting and publishing guidance and practice notes, nominating arbitrators, mediators or third party tribunals, and attending national and other committees. The SBCC is now the 'Relevant College' for the Scottish Construction Industry within the JCT and plays an active role in providing input to drafting where Scots law and practice apply.

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SBCC SBC/Q/Scot16, SBCC MW/Scot16

Structure

The SBCC has published 2016 editions of its forms to mirror the JCT's release of the JCT 2016 Contracts. The SBCC 2016 editions include:

- Standard Building Contract with Quantities for use in Scotland
- Standard Building Contract without Quantities for use in Scotland
- Standard Building Contract with Approximate Quantities for use in Scotland
- Design and Build Contract for use in Scotland
- Minor Works Building Contract for use in Scotland
- Minor Works Building Contract with contractor's design for use in Scotland.

Use

The SBCC forms are to be used in Scotland for the same type of projects that similar JCT contracts would be suitable for in England and Wales. Therefore, a relatively complex project requiring extensive control procedures is best let under the Standard Building Contract for use in Scotland (which is available in the same three versions as the JCT – with quantities, with approximate quantities and without quantities) while a design-build project would be suited to the Design and Build Contract for use in Scotland.

The most significant difference is that attestation is to be made in accordance with Scots law. The SBCC issues guidance on attestation procedures. Another difference concerns dispute resolution. The Arbitration (Scotland) Act 2010 applies in Scotland. This Act is, broadly speaking, similar to the legislation in England and Wales.

Architects undertaking work in Scotland who are not familiar with Scots law would do well to seek legal advice.

Synopsis of SBC/Q/Scot16 and comparison with JCT SBC16/Q

The SBCC Standard Building Contract with Quantities for use in Scotland (SBC/Q/Scot16) is closely modelled on JCT SBC16/Q.

A key change in the 2016 version is that the listing provisions have been removed and replaced by the use of named specialists.

The differences and notable points of similarity between the JCT and SBCC versions of the form are summarised below.

1 Roles

- As with JCT SBC16/Q, the Parties to the Contract are termed the Employer and the Contractor. Full details of both are entered in the Agreement.

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SBCC SBC/Q/Scot16, SBCC MW/Scot16

- The Contract makes provision for an Architect/Contract Administrator, who is identified in Article 3. The Architect/Contract Administrator's role includes issuing instructions, payment certificates, extensions of time and a practical completion certificate. A Quantity Surveyor (Article 4), Principal Designer (Article 5) and Principal Contractor (Article 6) must also be identified.
- As with JCT SBC16/Q, Supplemental Provision 9 allows for the Employer to require the Contractor to use specific specialist firms to undertake identified parts of the Works by means of naming them in the Contract Documents or in an instruction relating to a Provisional Sum. They may not be used for CDP work (Schedule 8: 9.1) and, unlike the named sub-contractor provisions in JCT IC16, there is no reference to them accepting any design responsibility.
- The Contractor is responsible for the performance of all sub-contractors, including listed sub-contractors and Named Specialists (3.7.1).
- The wording of the clauses dealing with statutory requirements is identical.

2 Documents

- There is an additional Article 10 on Registration: 'Parties consent to registration hereof for preservation and execution'.
- Schedules are the same as those in JCT SBC16/Q, except that there are significant differences in Schedule 6: Forms of bonds, where the bond in relation to off-site materials is replaced with a standard form Contract of Purchase. There is an additional Schedule Part 9: Contract Documents, under which the Parties are required to list all the documents forming the Contract.
- As for JCT SBC16/Q, Contract Bills, except where specifically stated otherwise, must be prepared in accordance with the RICS *New Rules of Measurement: Detailed Measurement for Building Works* (NRM2) (2.13.1).
- The applicable law is stated to be the law of Scotland (1.12).

3 Control: time

- The wording of the clauses is identical, except for some cross-references to clause numbers.

4 Control: quality

- The wording of the clauses is identical, except for some cross-references to clause numbers.

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SBCC SBC/Q/Scot16, SBCC MW/Scot16

5 Control: cost

- The wording of the clauses is identical, except for some cross-references to clause numbers and the fact that the provisions for payment for off-site goods have been replaced. Under the SBCC version, the Employer enters into a separate contract with the Contractor or sub-contractor and the goods and materials are thereafter excluded from this Contract (4.16).

6 Insurance

- The wording of the clauses is identical, except for some cross-references to clause numbers.

7 Termination

- The wording of the provisions is identical in both forms, except for the definition of 'insolvency' (8.1) and adjustments to take account of Scottish legislation (8.6).

8 Dispute avoidance and resolution

- Part II of the HGCRA as amended applies to Scotland and either Party has a statutory right to refer any difference or dispute arising under the Contract for adjudication.
- The procedures and rules for adjudication in clause 9.2 are identical to those in SBC16/Q.
- Unlike SBC16, arbitration is the default method for final resolution of disputes, unless the Parties state in the Contract Particulars that Article 8 and clauses 9.3 to 9.5 do not apply (in which case the final resolution will be by legal proceedings, under Article 9).
- Arbitration in Scotland is not subject to the Arbitration Act 1996 but the Arbitration (Scotland) Act 2010. Clauses 9.3 to 9.5 set out the relevant Rules which will apply, unless indicated otherwise in the Contract Particulars.

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SBCC SBC/Q/Scot16, SBCC MW/Scot16

This contract?

If considering using SBC/Q/Scot16, the following points should be borne in mind.

It is a complex and sophisticated contract with many optional provisions and is intended for substantial projects.

It can only be used where the employer has engaged a professional consultant to act as contract administrator. There is provision for bills of quantities and for a quantity surveyor to be appointed.

Work needs to be fully documented at tender stage and to be completed within a stated period. The contractor may be required to design an identified part of the works, in which case it must be provided with detailed employer's requirements at tender stage. Otherwise, the contractor is to be provided with fully detailed design information, ideally prior to the contract being entered into, as any information provided later may give rise to claims. The contract allows for subcontractors to be chosen by the contractor from a list of not fewer than three names, and also for the employer to name specialists to undertake specific work, other than the CDP.

When completing the form, entries are required relating to decisions on matters including which supplemental provisions will apply, deferment of possession, named specialists, bonds, insurance of the works, Joint Fire Code, liquidated damages, advance payment, fluctuations and dispute resolution.

If acting as contract administrator, note that SBC16/Q/Scot16 requires a comprehensive understanding of its procedural rules, many of which are detailed and sophisticated.

References and further reading

SBCC Standard Building Contract with Quantities for use in Scotland 2016

MacRoberts LLP, *MacRoberts on Scottish Construction Contracts*, Chichester: Wiley-Blackwell (2014)

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SBCC SBC/Q/Scot16, SBCC MW/Scot16

Synopsis of MW/Scot16 and comparison with JCT MW16

The SBCC Minor Works Building Contract for use in Scotland (MW/Scot16) and Minor Works Building Contract with contractor's design for use in Scotland (MWD/Scot16) are closely modelled on the JCT's MW16 and MWD16, respectively.

A key change in the 2016 version is that the listing provisions have been removed and replaced by the use of named specialists.

The differences and notable points of similarity between the JCT and SBCC versions of the forms are summarised below.

1 Roles

- As with JCT MW16, the Parties to the Contract are the Employer and the Contractor. Full details of both are entered in the Agreement. There is provision for an Architect/Contract Administrator to be named in Article 3, as well as a Principal Designer (Article 4) and Principal Contractor (Article 6).
- Unlike MW16, the Contract provides for the appointment of a Quantity Surveyor (Article 5).
- Unlike MW16, MW/Scot16 provides for Named Specialists (Supplemental Provision 9). This allows the Employer to require the Contractor to use particular specialist firms to undertake identified parts of the Works (not including any CDP work), by naming them in the Contract Documents or in an instruction relating to a provisional sum. Unlike the Named Sub-Contractor provisions in IC16, there is no reference to them accepting any design responsibility.

2 Documents

- MW/Scot16 provides for the optional use of Bills of Quantities (Second Recital and Third in MWD/Scot16).
- There is an additional Article 10 on Registration: 'Both Parties consent to registration hereof for preservation and execution'.
- The Schedules differ from those in MW16 and MWD16, and are the same for both forms, namely Schedule Part 1: Arbitration, Part 2: Fluctuations and Part 3: Supplemental Provisions. There is an additional Schedule Part 4: Contract Documents, under which the Parties are required to list all the documents forming the Contract.
- The applicable law is stated to be the law of Scotland (1.8).

3 Control: time

- The wording of the clauses is identical, except for some cross-references to clause numbers.

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SBCC SBC/Q/Scot16, SBCC MW/Scot16

4 Control: quality

- The wording of the clauses is identical, except for some cross-references to clause numbers.

5 Control: cost

- The wording of the clauses is identical, except for some cross-references to clause numbers.

6 Insurance

- The wording of the clauses is identical, except for some cross-references to clause numbers.

7 Termination

- The wording of the provisions is identical in both forms, except for the definition of 'insolvency' (7.1.) and adjustments to take account of Scottish legislation (7.6).

8 Dispute avoidance and resolution

- Part II of the HGCRA applies to Scotland and either Party has a statutory right to refer any difference or dispute arising under the Contract for adjudication.
- The procedures and rules for adjudication in clause 8.2 are identical to those in MW16.
- Unlike MW16, arbitration is the default method for final resolution of disputes, unless the Parties state in the Contract Particulars that Article 8 and Schedule Part 1 do not apply (in which case the final resolution will be by legal proceedings, under Article 9).
- Arbitration in Scotland is not subject to the Arbitration Act 1996 but to the Arbitration (Scotland) Act 2010, and Schedule Part 1 sets out the relevant procedures and codes which will apply.

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SBCC SBC/Q/Scot16, SBCC MW/Scot16

This contract?

If considering using MW/Scot16, the following points should be borne in mind.

It is intended for building works of a simple, straightforward nature and is not suitable for work of such duration that full fluctuations provisions are required. It can only be used where the employer has engaged a professional consultant to act as contract administrator. There is provision for bills of quantities and a quantity surveyor may be appointed.

This contract is the only standard form for minor building works in Scotland. The form is drafted to ensure compliance with the CDM Regulations and with Part II of the HGCRA as amended.

As with JCT MW16, there is no provision for phased completion. Unlike the JCT form, this SBCC contract provides for the naming of specialists and there is also a dedicated SBCC subcontract available.

When completing the form, decisions are required relating to insurance of the works and damages for late completion. Appropriate deletions will indicate whether the final resolution of disputes is by arbitration or court proceedings.

If acting as contract administrator, the conditions are likely to prove adequate for most situations. The procedural rules are simple.

This SBCC form can be seen as more of a middle range contract for all work where the use of the full SBCC version of SBC16 cannot be justified. There is no SBCC equivalent of the JCT IC16 form.

References and further reading

SBCC Minor Works Building Contract for use in Scotland 2016
SBCC Minor Works Building Contract with contractor's design for use in Scotland 2016

MacRoberts LLP, *MacRoberts on Scottish Construction Contracts*, Chichester: Wiley-Blackwell (2014)

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Property Advisers to the Civil Estate 13

The Property Advisers to the Civil Estate (PACE) published the suite of Government Conditions of Contract (GC Works) through The Stationery Office between 1973 and 2002. The GC Works contracts were primarily developed for government projects but could also be used for private sector projects. In 2001, PACE merged with The Buying Agency (TBA) and the Central Computer and Telecommunications Agency (CCTA) and joined the Office of Government Commerce. The contracts in the GC Works suite are no longer updated although they are still used, mainly for private sector projects.

GC/Works/1 With Quantities 1998

GC/Works/1 Single Stage Design and Build 1998

GC/Works/1 Two Stage Design and Build 1999

GC/Works/2 1998

GC/Works/4 1998

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GC/Works/1

The Stationery Office

GC/Works/1 With Quantities (1998)

GC/Works/1 With Quantities (1998) is a particularly comprehensive publication and can be adapted to suit a wide range of applications. It is similar in structure to its immediate predecessor and even uses the same numbers for most of the conditions. There are, however, fundamental differences in the text, which are not always immediately apparent. The earlier published form was intended to be used almost exclusively by government departments and reflected the methods and procedures of contract administration then in use in those departments. The form was not intended to be even-handed in all matters and the project manager was afforded absolute authority, with many of his or her decisions being 'final and conclusive'. The current form is intended to be sufficiently adaptable to be used by non-central government employers (such as local authorities, educational institutions, housing associations, NHS trusts, etc) and by private sector employers. To facilitate this wide range of potential users, an attempt has been made to produce a form that strikes a fair balance between the interests of the employer on the one hand and those of the contractor on the other. A 'fair dealing' clause has been introduced and there is recognition of the fact that the project manager's decisions are now open to adjudication.

Background

GC/Works/1 first appeared in 1973 as a form intended to be used almost exclusively by central government departments. GC/Works/1 (1998) is a direct successor and is published for use in major civil engineering or building projects, under design-bid-build, design-build or management procurement. It can also be used by non-central government agencies and private clients.

The use of GC/Works has declined over the years. The UK government's endorsement of collaborative contracts, such as the NEC suite and JCT's Constructing Excellence, has led to their widespread use in government projects. Although contracts in the GC suite are still being used sparingly in some projects, its decline in importance is best exemplified by the fact that it has not been updated to comply with current legislation.

GC/Works/1 contracts are for use on major building and engineering projects and are available in six versions as follows:

GC/Works/1: with quantities (1998)
GC/Works/1: without quantities (1998)
GC/Works/1: single stage design and build (1998)
GC/Works/1: two stage design and build (1999)
GC/Works/1: with quantities construction management trade contract (1999)
GC/Works/1: without quantities construction management trade contract (1999).

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GC/Works/1

The range of contracts under the GC/Works label is comprehensive and includes:

GC/Works/2: for building and civil engineering minor works (1998)
GC/Works/3: for mechanical and electrical engineering works (1998)
GC/Works/4: for building, civil engineering, mechanical and electrical small works (1998)
GC/Works/5: Part 1: general conditions for the appointment of consultants (1998)
GC/Works/5: Part 2: general conditions for the appointment of consultants – term contracts: framework agreement for consultancy services (1999)
GC/Works/6: for a daywork term contract (1999)
GC/Works/7: for measured term contracts (1999)
GC/Works/8: for a specialist term contract for equipment maintenance (1999)
GC/Works/9: for operation, repair and maintenance of plant, equipment and installations (1999)
GC/Works10: for facilities management (2000).

The last amendment of the form took account of the recommendations in the Latham Report and complied with the conditions of Part II of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA). Amendment 1, applicable to GC/Works/1 Design and Build forms only, was published in 2000 to take account of the government's 'Achieving Excellence' initiative and includes clauses to cover risk management, value engineering and whole life costing. It must be noted that this contract has not been updated to comply with the amendments to the HGCRA by the Local Democracy, Economic Development and Construction Act 2009 (LDEDCA). It would therefore require extensive amendment of the payments sections, at the very least, for it to be used on projects commencing in England after 1 October 2011 (1 November 2011 for Scotland).

Structure

The document runs to over 80 pages. There is an introduction and contents list, followed by the conditions, which are set out in a clear graphic style using straightforward language and well-established terminology. Also included are a schedule of time limits (providing a useful summary for contract administrators), a detailed alphabetised index, the customary abstract of particulars, but with an addendum for entries about information yet to be supplied, and the tender forms. The contract agreement is in two versions so that the contract can be used under Scots law or under the law of England, Wales and Northern Ireland.

Use

GC/Works/1 is intended for use in major building or civil engineering works. The conditions include:

- design by the contractor and subcontractors
- professional indemnity insurance for design

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GC/Works/1

- an incentive bonus for early completion
- finance charges
- mobilisation payments
- payments to the contractor on the basis of stages, milestones or valuations
- performance bonds
- parent company guarantee
- collateral warranties.

The factual details relating to a particular contract and the incorporation of optional provisions will be determined by the entries made in the abstract of particulars. The abstract is detailed and requires, among other things, the names of the project manager and planning supervisor (who may be the project manager) to be entered, although the planning supervisor title would need to be amended to principal designer. There is also space for the adjudicator and the arbitrator to be named in this document. It is recommended in the notes that the same adjudicator and arbitrator are named in all the employer's related contractual documents, whether with the contractor, consultants or others. This could be problematic if the disputes are not related.

A contract agreement is to be executed in duplicate and the date entered. Government contracts are not normally executed under seal, but there is space for attestation if required.

Synopsis

1 Roles

- The parties to the Contract are the Employer and the Contractor. A Project Manager is identified in the Abstract.
- There is a fair dealing clause which requires both parties to act in good faith and in a cooperative and open relationship (1A).
- The Contractor is to execute the Works 'with diligence, in accordance with the Programme, with all reasonable skill and care and in a workmanlike manner'. If any part of the Works does not conform with the Contract and is rejected by the Project Manager, then it must be replaced by the Contractor at its own expense (31(6)). The terms 'the Works' and 'Things' are defined (1(1)).
- The Contractor may be required to accept responsibility for design work in respect of such work carried out by the Contractor, or by a sub-contractor or supplier. The Contractor's liability can be either the professional duty to exercise reasonable skill and care (10 – Alternative A) or warranted by a fitness for purpose warranty (10 – Alternative B).

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GC/Works/1

- The Contractor must be prepared to satisfy the Project Manager in respect of the execution of the Works, and that it is using the skill and care expected of an experienced and competent contractor.
- The Contractor is to give all statutory notices required, obtain any consents necessary and pay all fees and charges arising. The Employer will reimburse fees or charges properly incurred. An obligation on the Contractor acting as Principal Contractor to comply with the CDM Regulations is expressly stated (11).
- The Contractor is also required to conform to any occupier's rules or regulations (if stated in the Abstract of Particulars) relevant to the site or the premises within which it is working (22).
- The Contractor is required to comply with all statutory requirements which govern the storage and use of all Things brought on to the Site (13(2)).
- Sub-letting is barred without the prior consent of the Employer or the Project Manager (62(1)).
- The main Contractor must see that sub-contract works are completed (62(4)).
- Sub-contractors or suppliers may be nominated on the basis of a Prime Cost sum (63(1)). The Contractor is entirely responsible for the performance of any nominated sub-contractors, except that, if optional clause 63A is stated to apply, the Employer will bear the losses due to insolvency. In the event of determination of a nominated sub-contract, the Employer may nominate a replacement sub-contractor or supplier or direct the Contractor to complete the work (63(7)). There are no stated procedures and no requirement to use a particular form of contract. The Contractor is given the right of reasonable objection (63(6)).
- The Contractor is not allowed to assign or transfer the Contract or any interest without the written consent of the Employer (61).

2 Documents

- The 'Contract' means the Contract Agreement, Conditions, Abstract of Particulars, Specification, drawings, bills of quantities, Programme, tender, and the Employer's written acceptance (1(1)).
- A list of definitions is included (1(1)).
- The Contractor is to draw the Project Manager's notice to any discrepancies discovered between the Specification and drawings, or between drawings (2(3)). The Conditions prevail where any documents conflict with them (2(1)).
- Bills of quantities are to be prepared in accordance with the method of measurement identified, except where stated otherwise (3(1)). Any errors or omissions in the bills are to be rectified by the Employer (3(3)).

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GC/Works/1

- The Contractor is to receive a copy of drawings issued 'during the progress of the Works' in a form which the Project Manager considers suitable for reproduction (2(5)).
- In any sub-contract, the Contractor is required to ensure certain terms (62(2)). The Contractor is responsible for seeing that sub-contractors comply with all obligations imposed upon them.
- There appears to be no express condition for contracting out of the Contracts (Rights of Third Parties) Act 1999.

3 Control: time

- The contract period will be stated in the Abstract of Particulars (34(1)). The Employer will notify the Contractor when it may take possession of the Site or parts of the Site. All notices under the Contract are to be in writing (1(3)).
- The Contractor is required to proceed with diligence and in accordance with the Programme, or as the Project Manager instructs (34(1)). The whole of the Works or any relevant Section must be completed in accordance with the Contract, and to the satisfaction of the Project Manager, by the Date for Completion (34(1)).
- The Date for Completion is set out in or ascertained from the Abstract of Particulars (1(1)). This provision envisages practical completion (although it is not termed this) and includes clearing of rubbish and all Things not incorporated (34(2)).
- The Contractor is required to submit a Programme prior to acceptance of the tender, for it to be agreed by the Employer (1(1)). The Programme is to be for the whole period for completion and must show the planned sequence for execution of the Works and other specified information (33(1)).
- Regular progress meetings are to be held (35(2)) and the Contractor is obliged to submit a written report on progress, including requests for extensions of time and re-programming proposals, at least five days before each meeting (35(3)).
- If notice is given, or if the Project Manager is already aware of likely delay, the Project Manager shall consider whether or not to award an extension (36(1)). The causes for which an extension may be awarded are listed (36(2)) and the Project Manager is to indicate whether the award is interim or final. The Project Manager is to keep interim decisions under review until a final decision is possible (36(3)). It is interesting that weather is not recognised as a cause of delay.
- The Project Manager is required to issue a written statement of progress within seven days after each progress meeting (35(4)).
- Acceleration of completion is possible upon direction by the Employer, subject to acceptance of the Contractor's priced proposals (38). The Contractor may also choose to submit priced proposals and Programme amendments for the Employer to consider.

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GC/Works/1

- The Project Manager shall issue a certificate when the Works, or any Section, are completed in accordance with the Contract (39).
- Failure to complete the Works or a Section (which includes clearance) by the relevant Date for Completion makes the Contractor liable to the Employer for liquidated damages (55). There is no reference to a certificate of non-completion.
- The Maintenance Period will be stated in the Abstract of Particulars (21(1)). The Contract accepts that there might be more than one Maintenance Period. The Contractor is obliged to make good defects at its own cost and to the satisfaction of the Employer. Any arguments about liability and reimbursement must wait until after defects have been rectified.
- There is provision for completion of the Works by Section if specified in the Abstract of Particulars (1(1)).
- There is provision for the Employer to take early possession of any part of the Works, and this also relates to completion by Sections (37).

4 Control: quality

- The quality of 'Things' for incorporation is to conform to the requirements of the Specification, bills and drawings and be fit for their intended purposes (31(2)).
- Instructions from the Project Manager must be in writing (40(3)), except for a few (listed) which can be oral and confirmed later. The Contract sets out the instructions that are empowered (40(2)).
- Instructions can be given by the Project Manager or delegated to the Project Manager's representative (4), and the Contractor must comply forthwith. Instructions requiring a variation are termed Variations Instructions (VIs). The Project Manager may require the Contractor to submit a quotation of the full cost of complying with a VI within 21 days of the instruction (40).
- In the event of failure to comply with the Project Manager's instruction, the Employer may have the work done by others at the Contractor's expense (53). This right extends to rectifying defects (21(3)).
- The Project Manager is to provide the Contractor with information necessary for setting out the Works, and the Contractor is solely responsible for the correctness of the setting out (9).
- The Contractor shall employ a competent agent (5), who is to supervise the Works, be in attendance at site during all working hours and supply the Project Manager with 'returns' (15). A Clerk of Works or Resident Engineer may be appointed and the Project Manager or Quantity Surveyor may appoint representatives to exercise their respective powers – which must be listed (4).

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GC/Works/1

- The Project Manager may inspect, examine or have tests carried out (31(4)). Independent experts may be brought in to test fitness or suitability of Things and, if their findings disclose non-compliance with the Contract, then the Contractor must bear the cost of rectification and any further tests required (31(5)).
- The Employer has power to execute other works (which may or may not be in connection with the Works) during the execution of the Contract (65).
- The Project Manager is to certify unforeseeable ground conditions (7(4)).
- The Contractor is to give the Project Manager reasonable notice before covering up work (17) and shall not lay foundations until the Project Manager has examined the excavations (16).
- The Project Manager may order the replacement of the Contractor's site staff, including the agent (6(1)). The Project Manager has power to control the admittance of certain persons to the site (26).
- Security measures, such as a requirement for passes (27), the taking of photographs (28) and awareness on the part of all employees of the Official Secrets Act 1989 and, if applicable, the Atomic Energy Act 1946 (29) may be an obligation, where stated in the Abstract of Particulars.
- The Contractor has express obligations relating to the protection of the Works (13), the prevention of nuisance (14) and the removal of rubbish (34(2)).
- There is provision for the discovery of antiquities (32(3)).

5 Control: cost

- The Contract Sum is defined (1(1)) and may be adjusted as provided for in the Contract.
- The Contractor is deemed to have satisfied itself about the conditions under which it is working (7(1)). No additional payment is allowed except for unforeseeable ground conditions (7(5)).
- Provisional sums require instructions in writing from the Project Manager before work under these items begins (64). Valuation is as provided for in the contract (42).
- Valuation of Project Manager's instructions (40) may be by acceptance of a lump sum quotation. If there is no agreement, the Quantity Surveyor will value on the basis set out in clause 41, or clause 42(5) in the case of a variation instruction or clause 43 in the case of other instructions. Prolongation or disruption costs may be included as part of the valuation.
- The right to prolongation and disruption expenses generally is limited (46(1)). The matters are set down in the Conditions. Interest and finance charges are expressly excluded (46(6)). Recovery of expenses depends on written application from the Contractor made to the Project Manager in time (46(3)). The application must meet the requirements set down.

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GC/Works/1

- Finance charges may be payable to the Contractor only for limited reasons, and for stated periods (47(1) and (3)). The rate is to be stated in the Abstract of Particulars (47(2)).
- Progress payments, termed 'advances on account' (48), are based on either Stage Payments, Milestone Payments or Valuations (50(2) and (3)). Payments will include for work executed to the satisfaction of the Project Manager, and the Contractor is entitled to 95 per cent of the relevant sum, plus 100 per cent of certain other sums and certain adjustments (48(2)). The terms Stage Payment Chart and Milestone Payment Chart are defined (1(1)).
- After completion of the Works, the Contractor is entitled to be paid the amount estimated by the Employer as the Final Sum, less half the retention. The Quantity Surveyor shall send a copy of the final account to the Contractor within six months of certified completion (49(2)). The Contractor must notify agreement or otherwise within three months. The other half of any retention is released when the Final Certificate is issued at the end of the last Maintenance Period, and when the Contractor has complied with the requirement for making good defects.
- There is an extremely wide provision for recovery of sums where money is owed by the Contractor or to the Contractor, under this or any other contract with the Employer (51).

6 Insurance

- The Contractor is required to maintain for the duration of the Contract and the longest Maintenance Period: employers' liability insurance; insurance against loss or damage to the Works and Things for full reinstatement value; insurance against personal injury or damage to property (8). The evidence of insurance can be required within 21 days from acceptance of tender (Alternative A). The Contractor may be required to maintain insurance in the joint names of the Employer, the Contractor and all sub-contractors in accordance with details attached to the Abstract of Particulars (Alternative B).
- Where so stated in the Abstract of Particulars, and in connection with a contractor's design obligation, the Contractor may be required to take out and maintain professional indemnity insurance cover (8A).
- The Contractor is responsible for loss or damage to the Works and even extending to any Things not for incorporation in the Works (19(6)). This is in respect of any loss or damage, but where this arises because of 'accepted risks', defined in (1(1)), unforeseeable ground conditions or unforeseeable circumstances beyond the control of the Contractor, the Contractor will be reimbursed by the Employer. There is an absolute obligation on the Contractor to reinstate, replace or make good to the satisfaction of the Employer (19).

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GC/Works/1

- The Contractor is to take precautions needed to take care of the Site and to protect the Works against loss or damage from fire and any other cause, and shall take all reasonable steps to ensure the security and protection of the Site and Works, including lighting and watching (13(1)).

7 Termination

- The Employer may determine the Contract at any time by giving notice to the Contractor. This is a discretionary power which can be 'at will', and not conditional upon some default by the Contractor (56).
- In addition, the Employer has the right to determine the Contract for specific defaults by the Contractor, including insolvency (56(6)).
- The Contractor may determine the Contract on various stated grounds, and matters following determination by the Contractor are covered in clause 58.
- Matters following determination by the Employer (eg payment, completion, removal, transfer of sub-contracts) are dealt with in clause 57. The Quantity Surveyor shall ascertain and the Project Manager certify the cost to the Employer of completion of the Works.

8 Dispute avoidance and resolution

- There is provision for adjudication for the resolution of any dispute arising during the course of the Works (59(1)). There are precise requirements for the notice of referral and the procedures. A decision may normally be expected within 28 days of the notice. The adjudicator's decision is binding until the dispute is finally determined by legal proceedings or by arbitration.
- Arbitration is included, in addition to adjudication, as a means of dealing with disputes (60(1)), and the arbitrator is given wide powers under the Contract.

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GC/Works/1

This contract?

If considering using GC/Works/1, the following points should be borne in mind.

This was the principal form for lump contracts originally drafted for use by central government but it was substantially revised in the 1998 edition to allow for a much wider application, including use by private sector employers. However, it is still intended primarily for use by government departments or Crown agencies. There are versions for use with and without quantities. The form has not been updated to comply with current regulations and therefore may not be suitable for use on a new project commencing after 1 October 2011 unless it is substantially amended.

It can be used for work in England and Wales, and for work in Northern Ireland or Scotland. In the latter two cases, clause 60 deals with the differences in the arbitration process resulting from the contract being subject to the law of Northern Ireland or Scotland. There are relevant references to the statute law which applies to these countries, and a separate contract agreement for use under Scots law is included. Useful information is given in more detail in the commentary under 'Legal Background'.

GC/Works/1 can include completion in stages, design by the contractor with professional indemnity insurance, security measures, early possession, acceleration and cost savings, bonuses, nomination of subcontractors or suppliers, a mobilisation payment, alternatives for advances on account and bonds in lieu of retention. The wording is accessible and the graphic layout clear. The procedures are logical and there are many interesting features in the provisions; for example, that the contractor is to provide regular progress reports for comment by the contract administrator and that the contractor bears any losses resulting from failures on the part of nominated subcontractors. On the whole, the form places more risk on the contractor than the JCT SBC16.

When completing the contract details, the abstract of particulars is a vital document for tailoring the particular contract to the intended works.

If acting as project manager, contract administration should be relatively straightforward. The obligations and responsibilities are clearly stated, the person concerned is given considerable authority and the procedures are not arduous. However, it is necessary to keep a careful watch on the schedule of time limits.

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GC/Works/1

The 1994 Latham Report recommended that any government departments then using GC/ Works/1 should begin to change to the New Engineering Contract. The current 1998 GC/Works/1 family of forms may be seen as a robust response to that suggestion. GC/Works/1 has emerged as a versatile and well-structured document which embodies many of the Latham Report's points for 'an effective form of contract in modern conditions'. Amendments to the design-build versions were published in 2000, to introduce some of the recommendations of 'Achieving Excellence'. The Government Central Advice Unit also publishes some excellent Information Notes from time to time.

References and further reading

GC/Works/1 With Quantities (1998) General Conditions
GC/Works/1 Without Quantities (1998) General Conditions
GC/Works/1 Model Forms and Commentary
GC/Works Sub-Contracts

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GC/Works/1 Design and Build

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GC/Works/1 Single Stage Design and Build (1998)

GC/Works/1 Two Stage Design and Build (1999)

The GC/Works/1 Single Stage Design and Build version is an adaptation of the design-bid-build procurement GC/Works/1 contract. It is primarily a lump sum contract and does not distinguish a separate design phase. It is flexible in that it allows for varying amounts of design input by the contractor, as the contractor responds to the employer's requirements by developing the design outlined in these documents. The GC/Works/1 Two Stage Design and Build version is also predominantly a lump sum contract but, where the design may not be sufficiently advanced to enable the contractor to submit a realistic tender, a design fee is submitted initially, together with a schedule of rates. This is used to quantify the construction price at the end of the design phase. Completion of the design phase will not necessarily lead to the employer proceeding with construction. Both forms provide for a project manager to act on the employer's behalf.

Background

GC/Works/1 Edition 3 for design-bid-build procurement was first published in 1989. Shortly afterwards, with the demise of the Property Services Agency, government departments assumed responsibility for their own projects. Some looked to non-traditional procurement approaches, design-build in particular, which was becoming increasingly popular. In response to this interest, a version of GC/Works/1 for Single Stage Design and Build was introduced in 1993 and is currently in a 1998 revised form, with a 1999 version for Two Stage Design and Build. In 2000, GC/Works/1 Amendment 1 was published in response to the government's 'Achieving Excellence' initiative, and is applicable to both forms. It includes provisions for risk management, value management, whole life costing and value engineering.

This form has not been updated to comply with the HGCRA as amended by the LDEDCA so the use of this form in a new project would require extensive amendments.

Structure

For the purposes of this guide, comments will focus on the Single Stage version of the design-build contract unless stated otherwise.

In common with other GC/Works forms, this comes as a two-volume pack comprising the General Conditions, which run to over 80 pages, and the Model Forms and Commentary. The General Conditions are prefaced by a contents list and followed by an index. Language and terminology are clear and typical of the GC/Works suite.

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GC/Works/1 Design and Build

The 65 clauses appear under the standard nine headings, and a large number are identical to those found in the design-bid-build form. There is also a very useful schedule of time limits, the essential abstract of particulars with an addendum which is really a schedule of design information, an invitation to tender, tender and tender price form, and the contract agreement.

Use

The Single Stage version has no separate design stage. The design input required from the contractor will be to the extent desired, and as indicated in the employer's requirements. The contractor's proposals will be submitted as part of the tender together with a programme, a pricing document and details of professional indemnity insurance.

The tender price form includes alternative entries depending on whether, in clause 10, Alternative A (design liability limited to using reasonable care and skill) or Alternative B (warrant of fitness for purpose) applies.

The Two Stage version calls for a separate design stage and the lump sum figure tendered is arrived at in two stages.

The conditions in GC/Works/1 Design and Build provide for:

- design documents, with copyright in design and documents established
- professional indemnity insurance for design
- an incentive bonus for early completion
- finance charges
- mobilisation payments
- payments to the contractor on the basis of stages, milestones or valuations
- performance bonds
- parent company guarantee
- collateral warranties
- as-built drawings and documents.

The factual details relating to a particular contract, and the incorporation of optional provisions, will be determined by how the abstract of particulars is completed. The abstract is detailed and, among other things, requires the names of the project manager and planning supervisor (who may be the project manager) to be inserted. The provision of a project manager to act on the employer's behalf, and given so much authority, is somewhat unusual in design-build contracts. The adjudicator and the arbitrator may also be named.

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GC/Works/1 Design and Build

Synopsis (Single Stage version)

The form is one of the family of GC/Works/1 contracts. The conditions are broadly similar to those of the design-bid-build GC/Works/1 form and it is therefore unnecessary to repeat much of the detail, which appears earlier in this chapter. However, the design-build forms differ in several important respects and some of these differences are detailed below.

- The definitions include items which are mainly relevant to design-build procurement, such as Employer's Requirements, Contractor's Proposals, Pricing Document, design, Design Document, etc.
- The fair dealing and team-working obligation extends to the project team, including those responsible for design and costs (1A).
- In the event of discrepancy between the Employer's Requirements and the Contractor's Proposals, it is the Requirements which prevail (2(2)). This is the reverse of the position in JCT design-build documents.
- The professional indemnity insurance requirements relating to design are similar for both the design-bid-build and design-build versions (8(A)), although in the former case these would apply only if stated in the Abstract of Particulars.
- The Contractor is solely responsible for the correctness of the setting out, and there is also a requirement on the Contractor to supply full 'as-built' drawings and other relevant information within 14 days of the Date for Completion (9).
- Although a Contractor's design obligation can be incorporated into the design-bid-build form, the design obligations are slightly different from those for design-build (10).
- The Design Documents provision (10A) is peculiar to the design-build form.
- The provision on Foundations (16) in the design-bid-build form is not included in the design-build version.
- The Contractor must provide samples as specified in the Employer's Requirements and obtain approval before commencing work (31(3)).
- The acceleration provisions differ (38).
- In the sub-letting provisions, the design-build form makes no reference to nominated sub-contractors (62). Obviously, therefore, the nominated sub-contractor provision (63) in the design-bid-build form is not used.

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GC/Works/1 Design and Build

This contract?

If considering using GC/Works/1 Design and Build, the following points should be borne in mind.

This form has not been updated to comply with the HGCRA as amended. Therefore the use of this form in a new project would require extensive amendments.

Although there is a contractor's design provision in the design-bid-build GC/Works/1, this is the true design-build version. Depending largely on the design information contained in the employer's requirements, a choice between single stage or two stage tendering will determine which version of the design-build form is most applicable.

When completing the contract details in the GC/Works forms, the abstract of particulars is a key document. If any special supplementary conditions are incorporated then, in the event of conflict, these prevail over the printed conditions. This is the reverse of the position with JCT contracts.

The wording of the conditions is clear and well presented. There are alternatives for design liability depending on whether this is stated to be the professional duty to use reasonable care and skill or absolute fitness for purpose.

Contract administration should be relatively straightforward and there is the customary GC/Works provision for progress meetings in clause 35. The Model Forms are published in a separate supporting document and must be used. There are eight documents collateral to the contract and a further 13 administrative forms.

As part of its Achieving Excellence initiative, the government challenged its own departments to become 'best practice clients'. This initiative addressed the concept of integrated supply chain routes, such as design-build, and value for money, taking into account whole life costing and value management. Incorporating Amendment 1 into the abstract of particulars for GC/Works/1 Design and Build contracts allowed the 'Achieving Excellence' targets to be progressed.

This form will appeal most to those with experience of GC/Works/1, to whom the terminology and procedures will be familiar. It is particularly interesting because it seems to give the employer and the project manager a degree of control over the contractor that is not usually found with design-build contracts.

References and further reading

GC/Works/1 Single Stage Design and Build (1998) General Conditions
GC/Works/1 Single Stage Design and Build (1998) Model Forms and Commentary
GC/Works/1 Two Stage Design and Build (1999) General Conditions
Amendment 1: Achieving Excellence (2000)

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GC/Works/2

The Stationery Office

GC/Works/2 Contract for Building and Civil Engineering Minor Works (1998)

GC/Works/2 is for use with lump sum tenders invited on the basis of specification and drawings only – without provision for bills of quantities, and with the optional requirement for the contractor to submit a schedule of rates to enable fair valuation of any variations. It is published as a two-volume package, comprising the General Conditions and the Supporting Model Documents and Commentary. The second volume includes a digital version of the 18 Model Forms.

Background

GC/Works/2 is sub-titled 'Contract for Building and Civil Engineering Minor Works', but it is more in the nature of an intermediate form, standing between the major works GC/Works/1 form and the GC/Works/4 small works contract. It is intended for contracts of between £25,000 and £200,000 in value, and for demolition works of any value. It replaces the former GC/Works/2 (1990) and the old small works C1010 (1990).

Structure

The General Conditions run to some 45 pages and follow the well-established GC/Works pattern of clear graphic style, straightforward language and standard terminology. The introduction and contents list are followed by the 48 conditions, under nine section headings.

In common with other GC/Works forms, there is a very useful schedule of time limits and an index, arranged alphabetically. Use of the Model Forms is essential.

Model Forms 1–7 are documents prescribed by the contract. Model Form 1 contains the abstract of particulars and addendum; Model Form 2 is an invitation to tender and schedule of drawings; Model Form 3 is a tender and tender price form; Model Form 4 contains details of insurance documents; Model Form 5 is a performance bond; Model Form 6 is a parent company contract performance guarantee; Model Form 7 relates to the appointment of an adjudicator.

Model Forms 8–18 are administrative documents. Model Form 8 is an 'Order to Proceed' which is, in effect, an instruction to the contractor to proceed with the works on a specified date. The rest of the Model Forms, whose titles explain their use, are as follows: Model Form 9 Certificate of Completion; Model Form 10 Maintenance Certificate; Model Form 11 Project Manager's Instruction; Model Form 12 Interim Payment Certificate; Model Form 13 Final Payment Certificate; Model Form 14 Notice of Intention to Withhold Payment; Model Form 15 Notice of Non-Compliance with Instruction; Model Form 16 Employer's Notice of Determination;

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GC/Works/2

Model Form 17, Employer's Notice of Intention to Refer to Adjudication; Model Form 18 Employer's Notice of Referral to Adjudication.

There is no separate contract agreement.

Use

GC/Works/2 has relatively limited provisions but they are almost certainly adequate for the kind of operations intended. As stated in the commentary, it is necessary when considering the choice of this form compared with, say, GC/Works/1, to establish whether certain features (eg sectional completion) are contractual requirements. If so, then this less comprehensive document might not prove suitable. The choice must be determined by the circumstances, the nature of the project and the balance of risks to be covered.

As there is no formal contract agreement, a contract will be brought into existence when the employer signifies acceptance of the contractor's tender. This should be in writing to bring certainty to the arrangement, particularly as the result will almost invariably be a 'construction contract' as defined in Part II of the HGCRA. GC/Works/2 makes no provision for a quantity surveyor, but a project manager and planning supervisor should be named in the abstract of particulars, and the name of an adjudicator and an arbitrator may also be entered.

Synopsis

1 Roles

- The parties to the Contract are the Employer and the Contractor. A Project Manager is named in the Appendix.
- A fair dealing provision is included (1A).
- The Contractor is to carry out the Works in accordance with the Contract Documents (2) and instructions of the Project Manager (25). The Works are as described in the Specification and shown on drawings, and will include all modified or additional works to be executed under the Contract (1). They are to be executed in a workmanlike manner and to the satisfaction of the Project Manager (19).
- The Contractor is required to give all notices, pay any fees and charges, and make and supply all drawings required to support such notices, arising from statutory obligations (6). This includes the CDM Regulations.
- The Contractor is required to comply with any statutory regulations relating to storage and use of all Things brought on to the Site (7(2)).
- The Contractor is required to comply with the applicable occupier's rules and regulations in respect of the Site (10).
- There is no provision for sub-contractors and suppliers to be nominated by the Employer or Project Manager.

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GC/Works/2

- The Contractor cannot assign the Contract or any interest without the written consent of the Project Manager (44). Sub-contracting requires the written consent of the Project Manager.

2 Documents

- The 'Contract' means the written agreement concluded by tender, acceptance, Conditions, Abstract of Particulars, Specification and drawings, etc, all taken together (1). In case of discrepancy, there is a detailed hierarchy (2).
- Further drawings, details, instructions, etc may be issued by the Project Manager from time to time during the Works (25).
- A full list of definitions is included (1).
- There is no express reference to rights of third parties, or to contracting out of the Contracts (Rights of Third Parties) Act 1999.

3 Control: time

- Possession is given to the Contractor by written order to proceed. The Contractor must, on receipt of the order, commence on a certain date, 'proceed with diligence' and complete by the Date for Completion (21(1)).
- A reasonable extension may be awarded by the Project Manager, but only for circumstances wholly beyond the Contractor's control (23).
- The Works must be cleared of rubbish and delivered up to the Project Manager's satisfaction by the Date for Completion (21(4)).
- Defects which appear during the Maintenance Period stated in the Abstract of Particulars must be made good to the satisfaction of the Employer at the Contractor's expense (9).

4 Control: quality

- All 'Things' selected by the Contractor for incorporation in the Works will be as described in the Specification and drawings and must conform to the requirements of the Contract (19(2)).
- The Project Manager may issue instructions on any matter necessary, including variations (25). Notices must be in writing and oral instructions confirmed in writing. The Contractor must comply forthwith.
- Instructions which result in a variation will be valued wherever practicable by prior quotation and agreement, or a relevant charge for daywork, or by the Project Manager, on fair rates and prices, and will include for disruption or prolongation costs (26).
- There is no reference to setting out, or to the Contractor's person-in-charge.

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GC/Works/2

- The Project Manager and its representative are empowered to order tests, and the cost will be borne by the Contractor where things are not in accordance with the Contract (19).
- The Employer may carry out work directly during the time when the Contractor is in possession (46).
- The Contractor has obligations concerning watching, lighting and protection (7) and the removal of rubbish (21(4)).
- Security matters, such as admission to the Site (14), taking photographs (16), passes (15) and the Official Secrets Act 1989 (17), may give rise to relevant obligations.

5 Control: cost

- The Contract Sum is defined (1) and the 'Final Sum' will be adjusted in accordance with the Contract.
- The Project Manager must give written instructions before provisional sum work is commenced (45). All such work will be valued as provided for in the Contract (26).
- The Contractor, following certification by the Project Manager, shall be entitled to monthly payments of advances on account (30). Valuations will be prepared by the Contractor and, if agreed by the Project Manager, the sum due will be certified by the Contractor.
- The Contractor is deemed to have satisfied itself about all matters which might affect the execution of the Works. No additional payment will be allowed because of any misunderstanding (4).
- The Contractor may have to allow credit for old materials. A total of 97 per cent of the value of work executed and value of Things for incorporation will be paid during the progress of the Works (30).
- On completion, the Contractor can expect to be paid what the Employer estimates the Final Sum to be, less half the retention (31(1)).
- The Project Manager will send the Contractor a draft final account within six months after completion, which is certified by the Project Manager. The Final Sum will be paid when the Project Manager certifies that the Works are in a satisfactory state following the Maintenance Period (31).
- The Contract fully complies with the HGCRA provisions concerning payment procedures.

6 Insurance

- The Contractor is required to take out and maintain employer's liability insurance in respect of its employees on site, and is advised to insert a similar provision in sub-contracts (5(1)).

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GC/Works/2

- The Contractor shall insure in joint names against 'all risks' damage to the Works and Things for which the Contractor is responsible. This insurance will be for full reinstatement value plus professional fees (5(2)).
- The Contractor indemnifies the Employer in respect of injury to persons, loss or damage to third party property and loss of profits or use, and will cover this by insurance (5(2) and 8).
- The Employer is to bear the responsibility for certain specified risks arising from work to existing structures, and may elect to take out insurance (5(6) and 8).

7 Termination

- The Employer has the right to determine the Contract for specified grounds, including insolvency of the Contractor (38).
- Matters following determination (payment, completion, removal, etc) are dealt with in clause 39. The Project Manager must certify the cost of completion.
- The Contractor may determine the Contract for specific grounds, including insolvency of the Employer (40).
- Either party may determine the Contract following suspension of the whole or substantially the whole of the Works (41).

8 Dispute avoidance and resolution

- There is provision for adjudication for the resolution of any dispute arising out of the Contract (42). There are precise requirements for the notice of referral and the procedures to be followed. The adjudicator may be named in the Abstract of Particulars and the adjudicator's decision is binding on the parties, at least until finally determined by arbitration.
- Arbitration is given as the forum for final resolution of disputes and the arbitrator is given wide powers under the Contract (43).

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GC/Works/2

This contract?

If considering using GC/Works/2, the following points should be borne in mind.

This contract has not been updated to comply with amendments to the HGCRA and may therefore require significant amendment before use.

It is intended for use when lump sum tenders are being invited on the basis of drawings and a specification only.

Its use is no longer confined to central government departments.

The employer is required to appoint a project manager, who is given considerable powers to act for the employer, subject to certain excluded matters which may be listed in the abstract of particulars. There is no requirement for a quantity surveyor, and functions normally ascribed to the quantity surveyor are the responsibility of the project manager.

The form may be used in England and Wales, or under the law of Northern Ireland, or under Scots law. The arbitration provisions appropriate to the use of the form in Scotland are set out in clause 43.

The conditions are general and the abstract of particulars allows for some flexibility in tailoring the contract to the nature of the intended work. There is no provision for sectional completion. There is no provision for nomination of subcontractors or suppliers by the employer.

The two-volume presentation is comprehensive and the Model Forms should be used, as some of them carry information which is supplemental to the conditions. The commentary is practical and particularly informative.

Contract administration should be straightforward, always provided that the administrator takes the trouble to become thoroughly conversant with the terminology, the procedures and the time limits. Rather unusually, but very sensibly, progress meetings become contractual obligations, although there is no requirement for a programme.

This is an attractive form which has many features not found in other short forms. The result is a fairly substantial document that can cover a wide range of work which is too complex for GC/Works/4 but does not justify the use of GC/Works/1. It may also be seen as an alternative to using the JCT Minor Works and Intermediate Building Contracts.

References and further reading

GC/Works/2 Contract for Building and Civil Engineering Minor Works (1998)

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GC/Works/4

The Stationery Office

GC/Works/4 Contract for Building and Civil Engineering, Mechanical and Electrical Small Works (1998)

GC/Works/4 is for use with lump sum tenders invited on the basis of specification and drawings only, without provision for bills of quantities. It is published as a two-volume package comprising General Conditions, and Supporting Model Documentation and Commentary. The second volume includes a digital version of the 13 Model Forms.

Background

This form is sub-titled 'Contract for Building, Civil Engineering, Mechanical and Electrical Small Works' and is obviously intended as a general purpose document to cover small works of a varied nature. It is intended for contracts of up to £75,000 in value and replaces Form C1001 (1990).

Structure

The general conditions run to some 18 pages and are set out in clear graphic style, using straightforward language and GC/Works terminology. There is a contents list followed by the conditions, of which there are 31 structured under seven headings.

As with other GC/Works forms, there is a Schedule of Time Limits. Use of the Model Forms is essential. Model Form 1 contains the abstract of particulars; Model Form 2 is an invitation to tender and schedule of drawings; Model Form 3 is a tender and tender price form; Model Form 4 is the adjudicator's appointment; Model Form 5 is the order to proceed; Model Forms 6 to 13 are contract administration forms.

Use

GC/Works/4 has provisions which should be sufficient for most small projects where services installations also form part of the contract, but the choice should ultimately depend on the nature of the intended works. However, the form refers to a superseded version of the CDM Regulations and so would need to be amended. It also has not been updated to comply with the provisions of Part II of the HGCRA as amended by the LDEDCA, so it may not be suitable for use on projects commencing after 1 October 2011 without amendment.

Synopsis

1 Roles

- The parties to the Contract are the Employer and the Contractor. A Project Manager is named in the Abstract of Particulars.

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GC/Works/4

- A fair dealing provision is included (1A).
- Conditions of contract prevail in the event of discrepancy, except where special supplementary conditions are included in the Abstract of Particulars (2.1).
- The Contractor is responsible for the care of the Site and Works, including having sole responsibility for protection, security, lighting and watching over the Site and Works (5).
- The usual GC/Works provisions for matters such as occupier's rules, Site admittance, passes, photography and the Official Secrets Act 1989 are included in a truncated form.
- The Works must be cleared of rubbish and delivered up to the Project Manager's satisfaction on completion (15).
- The Contractor cannot assign or sub-let without the written consent of the Project Manager (30).
- The Employer may carry out work directly during the time when the Contractor is carrying out the Works (31).

2 Documents

- The 'Contract' means the written agreement concluded by tender, acceptance and all other documents referred to in them, including the Conditions of Contract, the Specifications and Drawings and other documents mentioned in the Abstract of Particulars.
- The Specification takes precedence over drawings unless otherwise instructed (2.2).
- There is no express reference to rights of third parties or to contracting out of the Contracts (Rights of Third Parties) Act 1999.

3 Control: time

- The Contractor's dates for commencement and completion will be stated in the Abstract of Particulars and subject to the Order to Proceed (15).
- A reasonable extension of time may be awarded by the Project Manager, but only for circumstances beyond the Contractor's control (16).
- There is no provision for prolongation and disruption.
- In the event of failure to complete to time, the Contractor may be liable for liquidated damages, or 'damages at large', as stated in the Abstract of Particulars (26).

4 Control: quality

- The making good of defects during the Maintenance Period will only apply if stated in the Abstract of Particulars (7).

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GC/Works/4

- The Project Manager may issue instructions on any matters necessary, including variations (17).
- There is no provision for provisional sums.

5 Control: cost

- Valuation of variation instructions whenever practicable will be by prior quotation and agreement, or by the Project Manager on the basis of fair rates and prices (18).
- There are no contract provisions relating to progress meetings.
- The contract price (tender as accepted) may be adjusted for variations (18), which will be reflected in the final account (21).
- Payment to the Contractor will be after completion, unless the Abstract of Particulars states that there will be advances on account (20). This will mean that one-third of the contract price will become payable after one-third of the work is completed, with the remainder due after completion. Applications must be made by the Contractor to the Project Manager and are subject to certification by the Project Manager (22).

6 Insurance

- The Contractor indemnifies the Employer in respect of any loss or damage which arises out of work under the Contract (6). There is no provision for insurance in this Contract.

7 Termination

- The Employer has the right to terminate the Contract for specified grounds, including insolvency of the Contractor (27).
- The Contractor has no rights to terminate the Contract.

8 Dispute avoidance and resolution

- Adjudication is the only provision for resolving disputes (28). The decision of the adjudicator is binding until finally determined by arbitration, but the form does not include provision for arbitration. Alternatively, the parties may agree to accept the decision of the adjudicator as final determination.

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GC/Works/4

This contract?

If considering using GC/Works/4, the following points should be borne in mind.

It is important to note that it has not been updated to bring it into compliance with current legislation.

It is intended for use when lump sum tenders are being invited on the basis of drawings and a specification only. Its use is no longer confined to government departments, although some provisions will obviously not be relevant to the private sector client (for example, the recovery of sums by the Crown under clause 24). The employer is required to appoint a project manager but there is no stated function for a quantity surveyor.

The form may be used under the law of England and Wales, under the law of Northern Ireland or under Scots law. The adjudication provisions appropriate to the use of the form in Scotland are covered in clause 29.

The conditions are relatively brief and, although limited in scope, are adequate for most small works. The abstract of particulars is an important document for tailoring this contract to a specific project.

The two-volume pack is attractively presented, although perhaps rather overly sophisticated for this class of work. Use of the Model Forms is essential.

Contract administration should be straightforward and the procedures are simple. The terminology is clear and typical of the GC/Works suite.

GC/Works/4 is an interesting basic alternative small works contract, particularly where services installations form part of the works. It is likely to appeal most to those already familiar with other GC/Works contracts.

References and further reading

GC/Works/4 Contract for Building and Civil Engineering, Mechanical and Electrical Small Works (1998)

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