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INTRODUCTORY GUIDE TO JCT CONTRACTS

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SESSION 1: GENERAL PRINCIPLES LAW AND INTRODUCTION TO CONSTRUCTION CONTRACTS

SECTION A: BASIC RULES OF CONTRACT

1. The law of contract is that part of the law of obligations founded on agreement.
2. The elements of a legally enforceable agreement (a contract):
 - Offer and acceptance (note: invitation to treat)
 - Consideration or recognised formality (deed)
 - Intent to create legal relationships
 - Certainty of terms
 - Capacity (individuals, corporations).Consider letters of intent and quasi-contract.
3. Vitiating factors:
 - Illegality (void)
 - Mistake (void)
 - Misrepresentation of fact (voidable).
4. Privity of contract:
 - Rights and obligations (who can enforce, see Contracts (Rights of Third Parties) Act 1999.
 - Transfer of rights to third parties (assignment)
 - Transfer of obligations to third parties (novation)
 - Substitute performance (sub-contracting)
 - Warranting performance to others.
5. The obligations under a contract:
 - Incorporation of terms
 - Express and implied terms
 - Conditions, warranties and innominate terms
 - Conditions precedent and subsequent
 - Exemption clauses
 - Passing of property in goods and materials.
6. Discharge of contracts:

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- By performance
- By breach of condition
- By repudiatory breach of an innominate term
- By anticipatory breach
- By frustration.

7. Consequence of non performance:

- If non payment, debt
- If breach, damages (compensatory, must mitigate)
- If breach of condition/repudiation, elective right to terminate (release of parties from future obligations)
- Exceptionally injunction or specific performance.

8. Defences:

- Contract void or voidable
- Exemption clauses
- Frustration
- Statue of limitations
- Failure to mitigate.

9. Forum of dispute resolution:

- Mediation/conciliation
- Adjudication (Housing Grants, Construction and Regeneration Act 1996)
- Arbitration (Arbitration Act 1996)
- Litigation (County Courts/High Court).

SECTION B: OBJECTIVES OF STANDARD FORM CONSTRUCTION CONTRACTS

The construction contract is the principal vehicle through which a project will be procured. It does not exist in a vacuum but are, or should be, prepared in response to a number of legal and practical issues, many of which have their roots in the nineteenth century, if not earlier.

1. Setting the parties' primary obligations (what is to be provided for how much, when?)

What is to be provided?

Consideration should be given to the various procurement routes and their allocation of design/performance risk (traditional, design and build, contract management, management contracting). Consideration should be given to whether there is to be a role for a contract administrator (agent or independent); Merton LB v. Leach (1985) 32 Build LR 51; Beaufort Developments v. Gilbert-Ash [1998] 88 Build LR 1 (HL)¹.

Is there to be a maintenance period after completion? How does this affect the employer's right to damages, consider Pearce v. Baxter [1999] BLR 101 (CA).²

¹ **Merton** Architect acts as agent when supplying contractor with drawings, instructions, levels, and the like and in supervising the progress of the works and seeing that it is properly executed. To the extent that the architect performs these duties, the employer contracts that the architect will perform them with reasonable diligence, skill and care. But were the contract confers on the architect discretionary powers which he must exercise with due regard to interests of contractor and employer, latter does not undertake that he will exercise those powers reasonably, rather than he will leave him free to exercise his discretion fairly and without improper interference. **Beaufort** suggests that may be an agent in all cases?

² **Pearce** A refusal to allow contractor to remedy defects or to give instruction to do so, restricts damages to cost contractor would have incurred in remedying them. Note different relationship between completion and maintenance period in JCT

How is the work to be provided described (drawings, quantities and/or schedules)? Is the work to be described prescriptively or by performance?

What is the standard of performance?

Are such standards to be express or implied (Sale of Goods Act 1979, Supply of Goods and Services Act 1982, common law)? For terms implied at common law see, for example Merton v. Leach (1985) 32 Build LR 51³.

Are standards to be objective or subjective (who decides compliance)?

Where are standards to be stated (contract conditions, drawings, quantities, specifications, schedules)?

When is performance required?

What dates are to be fixed, (start, on site, progress and completion dates, phases)? How is completion assessed? Certain contracts refer to Practical Completion. For a consideration of what this means see, for example Jarvis v. Westminster Corporation [1970] 1 WLR 637; Kaye v. Hosier & Dickinson [1972] 1 WLR 146, 165⁴.

What is to be paid for?

What is the payment route (lump sum, measurement and value, cost plus). Particularly in a lump sum contract, what work is to be paid for? Some lump sum contracts allow provisional sums. These, in effect, introduce packages of measurement and value work.

2. Altering the contracted for performance

Why must there be an express power to alter the contracted for performance?

Defining the scope of the power to alter performance (quantity and quality of work, method and timing of performance).

Determining the consequences of an alteration of performance (cost⁵, loss/expense, time).

3. Monitoring and controlling the manner of performance

Is a general power to instruct the contractor required?

Are provisions needed to allow for monitoring performance (early warning, assessing compliance (quantity, quality, method and time))?

Are provisions needed dealing with the possibility of defective work (opening up, testing, removal of defective work, dealing with potentially defective repetitive work)?

Are there any restrictions on who performs the contractor's primary obligations (contractor, sub-contractors, specialists, suppliers)? If so, who decides?

Who is entitled to performance (parties, assigns, third parties)? Are warranties to be provided, if so, on what terms?

contracts and ICE contracts.

³ **Merton** Implied term that employer would not hinder or prevent the contractor from carrying out its obligations in accordance with contract and from executing the work in a regular and orderly manner. No duty on the contractor to check for discrepancies and divergences in the architect's information.

⁴ **Jarvis** Probably can be practically complete despite latent defects. But not if patent defects, given the purpose of the maintenance period (substantial performance concept displaced?). All the construction work to be done must be done. Now often a link with the provision of information for the health and safety file.

⁵ How is the cost of the work assessed, this is one of the purposes of including a bill of quantities, see **Henry Boot v. Alstom** [2000] BLR 247 (CA).

4. Valuation and timing of payments

Balancing cash flow against security for the paying party. Complying with the statutory context (Housing Grants, Construction and Regeneration Act 1996).

Interim payment options (valuation of work, activity schedule, milestones). What is included and when (work, materials - unfixed, off-site, advances on account, mobilisation payments)? Determining the time and amount of payments (schedules, bills of quantities).

How does the assessment of interim payments relate to the contract sum?

Authorising and releasing payment (who decides, status of certificates, interim and final).

5. Risks and sanctions

Time and cost risks

How does the contract allocate responsibility for delays and additional costs due to delays or disruption in performance (defaults, neutral events).

Are damages for late completion to be liquidated. If so how is the rate of damages to be assessed so as to reflect the likely level of loss.

Performance risks and sanctions

Dealing with non-performance by contractor, sub-contractors or the employer: Suspending performance and determining the contract.

Balancing risks by retention of monies, passing of title clauses, rights of suspension (Housing Grants, Construction and Regeneration Act 1996). Consider also bonds, collateral warranties and limits on post completion liability (conclusivity provisions).

Injury to persons and property

Allocating the risks consequent upon injury to individuals or damage to the works and other property (indemnity and insurance clauses).

6. Dispute resolution

Alternative procedures for dispute avoidance, management and resolution (contract administrator, adjudication, arbitration/litigation, mediation). The legal context: Arbitration Act 1996; Housing Grants, Construction and Regeneration Act 1996, s. 108; status of contract administrator's decisions.

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SESSION 2: AN OVERVIEW OF STANDARD FORM BUILDING CONTRACTS AND JCT CONTRACTS

SECTION A: SELECTING AND ASSEMBLING THE CONTRACT PACKAGE

1. Selecting the right contract

Consider:

- Procurement route
- Complexity of project
- Need for selected sub-contractors/suppliers
- Value of project
- Role of contract administrator, if any.

2. Elements of the contract package

The agreement (letter or standard form, recitals).

The conditions of contract, amendments and supplements (standard/amended/bespoke).
Selecting the appropriate form.

The appendix (where options are selected).

Supporting documentation (drawings, specification, bills of quantities).

Related sub-contracts, amendments and supplements.

Collateral arrangements (warranties and bonds).

3. Entering into the contract

Concluding the contract (note different attestation sections in the JCT Standard Forms):

- Made as a simple contract (under hand, orally or by conduct).
- Executed as a deed. Signed as such, signature witnessed (or if a registered company, by affixing its seal or signed by two directors or a director and the company secretary), delivered.

There may be difficulties if the contract not concluded by signing a standard form.

SECTION B: OVERVIEW OF THE JOINT CONTRACTS TRIBUNAL AND JCT CONTRACTS

1. The structure of the JCT (a consensual body with participation from all sectors of the construction industry producing contracts to reflect a negotiated balance of risk).
2. The JCT family of contracts, traditional (JCT98, IFC98, MW98); design and build (WCD 98); cost plus (PC98); management contracting (MC98); and construction management (soon); plus

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matching supplements, sub-contracts and warranties; performance bonds (soon); professional services contracts (soon). The JCT produces amendments to its forms, from time to time as appropriate in light of case law, legislation, and changes in practice. It also provides guidance on when to use its forms, see Practice Note 20.

3. The use of MW98.

- Where minor building works are to be carried out over a reasonably short period for an agreed lump sum under the direction of an Architect/Contract Administrator.
- Where the lump sum is based on drawings, specification and/or schedules, but without detailed measurements (ie a bill of quantities).
- Where the value of the contract is generally under £70,000 at 1992 prices.
- Where there is no need to control the selection of specialist sub-contractors. This can be done by naming the selected person in the tender documents or, possibly (?), in instructions expending a provisional sum (but see MW98 clause 3.6). But there is no machinery dealing with the consequences of such naming. A direct contract with the person concerned might be preferable (see Practice note M2).

4. The use of IFC98.

- Where the traditional procurement route is appropriate (all work adequately specified or specified and billed prior to tender) and a lump sum price is required, the works to be under the direction of an Architect/Contract Administrator.
- Where the works are of simple content (although more complex than would be suitable for MW98) involving normally recognised basic trades and skills, the building services are relatively straightforward, and there is no specialist work of a complex nature.
- Where there may be a need to pre-select certain sub-contractors (naming) or for phased completion of the works.

5. The use of JCT98.

- Where the traditional procurement route is appropriate (all work adequately specified or specified and billed prior to tender and, except for limited cases provided for in the contract, designed by persons for whom employer responsible) and a lump sum price is required (unless approximate quantities version is used).
- Where IFC98 is not appropriate. For instance, because the work is not simple or limited to basic skills or trades, where complex services installations or specialist work is required, or where the contract value is high (more than £250,000 at 1984 prices) or the contract period long (more than a year).
- Where contract administrator/architect is to be appointed.

6. The JCT 98 variants.

- JCT98 with quantities. Where quantities are prepared in accordance with SMM7. A lump sum for the billed work.
- JCT98 with approximate quantities. Where quantities can only be a reasonably accurate forecast of work required. A measurement and value contract.

- JCT98 without quantities. Where quantities are not prepared. A lump sum for the work shown on the drawings and specifications and schedules, if any or, to the extent there are quantities, for those quantities.

All three variations are produced in a Private and in a Local Authority edition, the latter containing provisions considered specific to procurement by Local Authorities:

- Facility for a contract administrator or Architect
- Removal of the Contractor's right to object to replacements of Architect/contract Administrator or Quantity Surveyor where officials of the Local Authority
- Contract Documents are in the custody of Employer rather than Architect or Quantity Surveyor
- No right to require retention to be put in separate account
- The Local Authority can determine the Contractor's employment were latter commits an offence under s. 117(2) of the Local Government Act 1972.

The notes for JCT98 focus the Private with Quantities version of JCT98.

JCT amendments: After first publication, JCT80 was subject to 18 amendments plus amendment TC/94, the most recent being issued in May 1998, there were also numerous published amendments to IFC84 and MW80. JCT80, IFC84 and MW80 have now been re-issued as JCT98, IFC98 and MW98, incorporating all previous amendments except TC/94. Subsequently the JCT has published amendments 1 to 4 to JCT98 and a retention bond option. JCT has also published amendments 1 to 4 to IFC98 and MW98.

7. All versions of JCT98 include a number of optional provisions as well as clauses that must be completed or selected by the parties completing the appropriate Appendix entry.
8. The JCT produces a number of supplements for use with JCT98 where appropriate.
 - The Sectional Completion Supplement (not for Without Quantities) for use where phased completion is required.
 - The Contractor's Designed Portion Supplement where the Contractor is to design a discrete and limited part (not the whole) of the works.

Modifications must be made to the Articles of Agreement and the Conditions where these supplements are included. These are explained in the supplements themselves.

The details of these supplements are not considered in these notes.

9. The JCT produces a suite of related sub-contracts, warranties and tender forms for use with JCT 98 when sub-contractors are to be selected by the Employer (nomination). Post 1991 these comprise:
 - NSC/T: Tender forms for use between the Employer (by its Architect) and a proposed Nominated Sub-contractor
 - NSC/A: The Agreement to be concluded between the Contractor and a Nominated Sub-contractor
 - NSC/C: The Conditions of the Sub-contract between the Contractor and a Nominated

Sub-contractor

- NSC/W: The Warranty to be entered into between the Employer and a Nominated Sub-contractor
- NSC/N: The form to be used by the Architect to nominate a Sub-contractor in accordance with the Main Contract.

Detailed consideration of these forms is outside the scope of this course.

10. The JCT produces a similar but more restricted range of supplements and sub-contract forms for use with IFC98, in particular:

- A Sectional Completion Supplement for use where phased completion is required.
- NAM/T: A tender and agreement form for use where a Named Sub-contractor is to be appointed.
- NAM/SC: The Conditions of the Sub-contract between the Contractor and a Named Sub-contractor.

Two related forms are also produced by other bodies for use with IFC98.

- ESA/1: A Warranty to be entered into between the Employer and a Named Sub-contractor.
- IN/SC: Articles of Agreement for a domestic sub-contract.

Detailed consideration of these forms is outside the scope of these notes.

11. The role of consultants under the JCT contracts.

Most standard form JCT contracts provide for an Architect/Contract administrator to administer the contract on behalf of the Employer. Some also identify specific functions to be performed by a Quantity Surveyor and a Planning Supervisor. Although such persons have specific functions under the contract they are not parties to the contract and have no power to change its terms. If they fail to exercise any duties required of them the employer is in breach of contract. As regards their powers, the Employer is under the following implied obligations:

- Where they act as his agent, that they will act with reasonable skill and care
- Where they exercise discretion between the parties, that they will do so with due regard to the interests of both parties and that the Employer will not interfere with the exercise of their discretion
- See Merton v. Leach (1985) 32 Build LR 51.

None of the other consultants have functions under the contract, they can only provide information to the Architect or, if given functions, the Quantity Surveyor, to enable them to exercise their powers and duties and, if appropriate, to pass on to the Contractor.

SECTION C: JCT 98 - THE ARTICLES OF AGREEMENT

1. The Articles of Agreement comprise the agreement, the Recitals and the Articles.

The agreement identifies the parties to the contract and the date of the agreement. The parties are the Employer and the Contractor. The Employer must appoint a person as Architect, a Quantity Surveyor and a Planning Supervisor.

The Recitals are not contract terms. Rather they identify the Works (see clause 1.3), the Drawings and Bills describing those Works and the requirement for an Information Release Schedule (see clause 5.4) and a priced Activity Schedule (see clause 30.2.1, alternative A). The description of the Works must be completed accurately.

The Articles identify what is to be paid (article 2) for what (article 1, clause 14) and identify those appointed on behalf of the Employer to operate the contract conditions on his behalf (articles 3 and 4). Article 5 is the adjudication agreement. Article 6 identifies the Planning Supervisor and the Principal Contractor for the purpose of the CDM Regulations (see also clause 1.5). Article 7A is the arbitration agreement, article 7B a litigation option. But note also article 7 in Amendment TC/94 (terrorism cover), if incorporated.

2. Definitions

Defined terms are identified with upper case first letters. The definitions are given in clause 1.3. Note also clauses 1.8 and 1.7 dealing with the service of notices, etc and the reckoning of period of days.

3. The Contract Documents

These are defined in clause 1.3 and comprise (the Without Quantity version list is different):

- The Contract Drawings (what is to be constructed, where)
- The Contract Bills prepared in accordance with SMM7 (see clause 2.2.2)
- The Articles of Agreement
- The Conditions
- The Appendix

The interrelationship of the Contract Documents and the resolution of discrepancies or divergences in or between the specially prepared documents, such as Contract Drawings, Contract Bills, the Statement in respect of Performance Specified Work, if any, and other information provided by the Architect is governed by clauses 2.2, 2.3 and 2.4.

The resolution of divergences between this material and the Statutory Requirements is governed by clause 6.1.

SECTION C(1)⁶: MW98 - THE ARTICLES OF AGREEMENT

1. The Articles of Agreement comprise the agreement, the Recitals and the Articles.

The agreement identifies the parties to the contract and the date of the agreement, and provides for signatures. The parties are the Employer and the Contractor. The Employer must appoint a person as Architect and as Quantity Surveyor. There is also a role for the Planning Supervisor, if any (see clause 5.9).

The Recitals are not contract terms. Their principal function is to identify the work for which the Contractor tendered (The description in the first Recital must be completed accurately) and the drawings, Specification and/or schedules describing the Works. The fifth Recital identifies if the CDM Regulations apply in full (see clause 1.4).

The Articles identify what is to be paid (article 2) for what (article 1) and identify those appointed on behalf of the Employer to operate the contract on his behalf (article 3). Article 1 defines the Works (the work described in the first Recital together with any changes instructed under the Contract). Article 6 is the adjudication agreement. Article 4 identifies the Planning Supervisor (two choices) and Article 5 the Principal Contractor, for the purpose of the CDM Regulations (see also clause 1.3). Article 7A is the arbitration agreement, article 7B a litigation option. Note Article 7C. If neither 7A nor 7B selected, arbitration applies.

2. Definitions

Defined terms are identified with upper case first letters. There is no separate definitions clause. Note also clauses 1.5 and 1.6 dealing with the services of notices, etc and the reckoning of period of days (see also clause 7.1), and clause 1.7 dealing with the applicable law.

3. The Contract Documents

These are defined in the first Recital, are attached to the Agreement, and comprise:

- The Contract Drawings (what is to be constructed, where?);
- The Contact Specification (what is to be used, how?);
- The schedules (of rates, see second Recital)
- The Conditions and Supplemental Conditions (fluctuations, tax and dispute resolution).

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7. Amendments to JCT contracts. The JCT publishes amendments to all its contracts from time to time. Currently there are four published amendments to the MW98.

8. The role of consultants under the JCT contracts.

Most standard form JCT contracts provide for an Architect/Contract administrator to administer the contract on behalf of the Employer. Some also identify specific functions to be performed by a Quantity Surveyor and a Planning Supervisor. Although such persons have specific functions under the contact they are not parties to the contract and have no power to change its terms. If they fail to exercise any duties required of them the employer is in breach of contract. As regards their powers, the Employer is under the following implied obligations:

- Where they act as his agent, that they will act with reasonable skill an care
- Where they exercise discretion between the parties, that they will do so with due regard to the interests of both parties and that the Employer will not interfere with the exercise of their discretion
- See Merton v. Leach (1985) 32 Build LR 51.

None of the other consultants have functions under the contract, they can only provide information to the Architect or, if given functions, the Quantity Surveyor, to enable them to exercise their powers and duties and, if appropriate, to pass on to the Contractor.

The interrelationship between the Contract Documents and the resolution of inconsistencies in or between the specially prepared documents, such as Contract Drawings and Specification, is governed by clause 4.1 (obligations additional to those envisaged in the Conditions can be imposed by the specially prepared documents, provided they do not modify, override or affect the Conditions).

The resolution of divergences between this material and any statutory obligations is governed by clause 5.1.

SECTION C(2): IFC 98 - THE ARTICLES OF AGREEMENT

1. The Articles of Agreement comprise the Agreement, the Recitals and the Articles.

The agreement identifies the parties and the date of the agreement. The parties are the Employer and the Contractor. The Employer must appoint an Architect/Contract Administrator (see clause 8.4), a Quantity Surveyor and a Planning Supervisor.

The Recitals are not contract terms. Rather they identify the Works (see also article 1), the documents describing those Works, the optional requirement for an Information Release Schedule (see clause 1.7) and an optional priced Activity Schedule (see clause 4.2.1), the applicability of the CDM regulations and, most importantly, the basis on which the contractor's price has been prepared (2nd recital). Option A being used where there are priced bills, option B where there are no priced bills (see also clauses 1.2, 8.5).

The Articles identify what is to be paid (article 2) for what (article 1, clause 4.1) and identify those appointed on behalf of the Employer to operate the contract conditions on his behalf (articles 3, 4). Articles 5 and 6 identify the Planning Supervisor and the Principal Contractor for the purpose of the CDM Regulations (see also clause 1.12). Article 7 identifies whether or not sectional completion applies. Article 8 is the adjudication agreement. Article 9A is the arbitration agreement, article 9B a litigation option. But note also article 7 in Amendment TC/94 (terrorism cover), if incorporated.

2. Definitions

Defined terms are identified with upper case first letters. There is a list of definitions in clause 8.3. Note also clauses 1.13 and 1.14 dealing with the service of notices, etc. and the reckoning of period of days, and the option to use Electronic data interchange (EDI) for communications, clause 1.16, Annex 2.

3. The Contract Documents

These are defined in the second Recital (see also the first Recital) and comprise:

- The Contract Drawings (what is to be constructed, where)
- Option A: The Contract Bills (Specification/Schedules of Work/Bills of Quantities) prepared in accordance with SMM7 (see clauses 1.5, 8.5) or Option B: The Specification
- The Articles of Agreement
- The Conditions including (by implication) The Appendix.

The interrelationship of the Contract Documents and the resolution of discrepancies or divergences in or between the specially prepared documents, such as Contract Drawings, Contract Bills and other information provided by the Architect is governed by clauses 1.2, 1.3 and 1.4, but note also clauses 8.1 and 8.2.

The resolution of divergences between this material and the Statutory Requirements is governed by clauses 5.2 and 5.3, see also clause 5.4.

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SESSION 3: JCT 98: THE CONDITIONS: PART I

SECTION A: THE PARTIES' PRIMARY OBLIGATIONS

1. What is to be provided?

The Contractor's obligations as regards the Works:

- Clause 2.1: The Contractor's primary obligation to carry out and complete the Works as varied (see 1st Recital, clause 4.1, clause 13.1, 13.2, 13.3) and quality and standards to be achieved (both objective and subjective, see clause 30.9)
- Clause 1.5: The Contractor to remain wholly responsible for carrying out the Works notwithstanding any obligation of the Architect to the Employer or the appointment of a clerk of works.
- Clauses 42.2, 42.3: The Contractor's obligation to provide a Statement in respect of Performance Specified Work and to carry out Performance Specified Work (see clause 42.1) in accordance with that Statement (see clause 42.3)
- Clause 5.9: The Contractor's obligation to provide, prior to Practical Completion, as built drawings, information and manuals concerning Performance Specified Work
- Clause 6: The Contractor's obligation to comply with the Statutory Requirements (but note clauses 6.1.5 and 6.2).
- Clause 8.1: The Contractor's obligations as regards materials, goods and workmanship and in respect of the Health and Safety Plan (see also clause 8.2.1)
- Clause 9.5: The Contractor's responsibility for the Works, notwithstanding any Nomination of Sub-contractors.
- Clause 35.21: Limitation on the Contractor's liability in respect of Nominated Sub-Contractor's Work (principally concerning design).
- Clause 35.22: Limitations on Nominated Sub-Contractor's liability to Employer (note clause 1.7 of NSC/C restricts the Nominated Sub-Contractor's liability to the Contractor where it is required to contract with a person, other than the Contractor, under a contract that limits the sub-sub-contractor's liability.
- Clause 42.17: The Contractor's obligation to exercise reasonable skill and care in the provision of Performance Specified Work.

Architect's/Employer's obligations as regards the Works:

- Clauses 5.3 and 5.4: The Architect's (as agent) obligation to provide information to the Contractor in accordance with the Information Release Schedule and to enable it to carry out its obligations (note clause 42.3).
- Clause 7: The Architect's (as agent) obligation to provide levels.
- Clause 35.20: Employer not liable to Nominated Sub-Contractors other than under NSC/W.
- Clauses 42.5, 42.6: The Architect's (as agent) powers and obligations concerning the Contractor's Statement in respect of Performance Specified Work.
- Clauses 42.14: The Architect's (as agent) obligation to issue instructions concerning the integration of Performance Specified Work into the design.

Contractor's obligations after completion of the Works:

- Clause 17.2: The Contractor's obligation to make good certain defects, shrinkages or faults in the works appearing within the Defects Liability Period (one period).

Implied obligations:

- Implied obligations of the Contractor as regards materials, satisfactory quality, probably no fitness for purpose obligation, see Supply of Goods and Services Act 1982, Part I.
- Implied obligation of the Employer not to hinder or prevent the Contractor from carrying out and completing the Works.

2. When?

Clause 23.1: Regularly and diligently from the Date of Possession (note limited, optional, power of the Employer to defer giving possession) to the Completion Date (note relationship between Date for Completion and the Completion Date, see clauses 1.3 and 25).

Clause 24.1: If the Contractor fails to complete by the Completion Date the Architect issues a certificate to that effect.

Clause 17.1: The Architect certifies the date of Practical Completion when in his opinion this is achieved and the Contractor has provided information reasonably required by the Planning Supervisor for the preparation of the health and safety file (see clause 6A.4). Note the Contractor's limited obligations thereafter (see clause 17.2). See also clause 35.16 for Practical Completion of Nominated Sub-Contractor's work.

Clause 18: With the Contractor's consent the Employer can take possession of part or parts of the Work before Practical Completion, Practical Completion of such parts occurring when taken over. If phased completion is required the Sectional Completion Supplement should be used.

3. How much?

Article 2: The Contract Sum.

- This is generally payable for constructing the Bills of Quantities (see clause 14). But note the use of provisional sums and Approximate Quantities (clause 30.6.2.2.2, 30.6.2.2.12)

to introduce elements of cost plus or measurement and value.

- It is adjustable (see clauses 13.4, 14, 15.2, 26, 30.6 and 37).

SECTION B: ALTERING THE CONTRACTED FOR PERFORMANCE

1. The extent of the power

Clause 13.1: The Architect's power to issue instructions (see clause 4.1) varying the Works (note clauses 13.2.1, 13.2.2 and 42.11).

Clause 13.3: The Architect's duty to issue instructions concerning the expenditure of provisional sums. Note the different principles under the Standard Method of Measurement (clause 1.3) concerning defined and undefined work, clauses 13.5.3.3, 26.7), see also clause 42.8, concerning provisional sums in respect of Performance Specified Work.

2. The cost consequences

Clause 13.2.3: Procedures for valuing the work content. Note clause 13.4 (Alternative A, price statement, Alternative B valuation in accordance with clause 13.5, 13.6 and 13.7).

Clause 26: Procedures for determining the disruption costs (note clause 26.2.7), but note position where clause 13.4, alternative A applies).

3. The time consequences

Clause 25: Procedures for determining the time consequences (note clause 25.4.5).

4. Pre-agreeing the cost and time consequences

Clause 13A: Procedures for the submission by the Contractor of a quotation concerning the money and time consequences of a Variation and possible acceptance by the Employer (for non-acceptance see clause 13A.4).

SECTION C: CONTROLLING AND MONITORING THE MANNER OF PERFORMANCE

1. Instructions to the Contractor

Clause 4.1: The Contractor's obligation to comply with instructions of the Architect expressly empowered by the Conditions (note clause 4.2):

- Clauses empowering instructions comprise 2.2, 6.1.3, 7, 8.3, 8.4, 8.5, 12, 13.2, 13.3, 17.2, 17.3, 23.2, 32.2, 33.1.2, 34.2, 35.5.2, 35.6, 35.10.2, 35.11.2, 35.18.1.1, 35.23, 35.24.6.1, 35.24.6.3, 35.25, 36.2, 42.4, 42.11, 42.14
- Not all communications between the Architect and Contractor are instructions (see, for example, clauses 13.A.3.2, 27.2.1, 27.6.3, 35.2.6.1, 35.9, 42.5)
- In certain, limited, situations the Employer communicates directly with the Contractor (see, for example, clauses 13A.3, 13A.4, 27.2.2, 27.3.4).

Clause 4.3: Instructions are of no effect unless given or confirmed in writing (see also clause 12, limited status of Clerk of Works' directions).

2. Miscellaneous management procedures

Clause 5.1: Custody of Contract Drawings and Bills (The Architect retains originals and provides copies to the Contractor).

Clause 5.2: Provision of copies of Contract Documents (note clauses 5.6 and 5.7).

Clause 5.8: Distribution of Architect's Certificates (Originals go to the Client, copies to the Contractor, and Nominated Sub-contractors).

Clause 10: Contractor's person in charge and authority to receive instructions and directions.

3. Monitoring performance

Clause 5.3: Contractor to provide master programme to the Architect initially and after any extension of time decision (note clause 25.2, early warning of all delays).

Clause 8.2.1: Proof of materials and goods provided.

Clause 11: Architect's right of access to the Works and places where work being prepared for the Works.

Clause 12: A Clerk of Works may be appointed as inspector on behalf of the Employer.

Clause 42.2: Provision of the Contractor's Statement concerning Performance Specified Work (note clauses 42.3, 42.4, 42.5, 42.6, 42.14 and 42.15).

4. Controlling who performs and who is entitled to performance

Clause 1.12: Third party rights excluded (see the Contract (Rights of Third Parties) Act 1999).

Clause 8.6: The Architect's power to exclude persons from the site.

Clause 19.1: Restrictions on rights of assignment. Note Employer's optional right to assign to a purchaser or lessee of whole development.

Clause 19.2: Restrictions on the Contractor's right to sub-contract (see also clause 19.4).

Clause 19.3: Listing of persons (3 minimum) required to provide work (thus avoiding Nomination).

Clause 19.4: Sub-contract terms (title, and interest on late payments).

Clause 29: Work carried out by persons engaged by the Employer (note insurance implications and time and money consequences).

Clause 35: Procedures for nominating and, if necessary re-nominating Sub-contractors.

- Clause 35.1: Scope of the Architect's power to Nominate.
- Clause 35.2: Circumstances in which the Contractor may tender for Nominated Sub-Contract Works.
- Clauses 35.3 – 35.9: Procedure for Nominating Sub-Contractors.

- Clause 35.13: Payments to Nominated Sub-Contractors to be certified by Architect and provisions for direct payment in the event of Contractor default. Note also clauses 35.17 and 35.18. Early payment of Nominated Sub-Contractors.
- Clause 35.14: Architect's involvement in granting extensions of time to Nominated Sub-Contractors. Note also clause 26.4: Loss and expense payable to Nominated Sub-Contractors.
- Clause 35.15: Architect's Certificate of Non Completion of Nominated Sub-Contractor's work.
- Clause 35.16: Architects' Certificate of Practical Completion of Nominated Sub-Contractor's work.
- Clause 35.24: Re-Nomination procedures.
- Clause 35.35. Architect's involvement in the determination of Nominated Sub-Contractors' employment.

Clause 36: Procedures for Nominating Suppliers.

INTRODUCTORY GUIDE TO JCT 98

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SESSION 4: JCT 98: THE CONDITIONS: PART 2

SECTION D: VALUATION AND TIMING OF PAYMENTS

1. Interim payments

Clause 30.1: The timing of and payment in respect of Interim certificates.

- Interim Certificates stating amount to be paid and the basis of payment to be issued at the periods stated in the Appendix (monthly unless otherwise stated).
- Date of issue is the due date, final date for payment is 14 days from date of issue. Simple interest payable if payment late.
- Not later than 5 days after date of issue, the Employer to issue a notice to the Contractor specifying the amounts proposed to be paid and basis of payment.
- Any notice of withholding payment to be issued by the Employer not later than 5 days before the final date for payment.
- Employer to pay the amount of Interim Certificate unless a notice specifying amount proposed to be paid or notice of withholding payment is issued (clause 30.1.1.5), with interest if paid after the final date for payment.

Clause 30.2: Amounts to be included in Interim Certificates (gross valuation, principally based on work properly completed (calculated by reference to the Contractor's Priced Activity Schedule, if submitted) less Retention, less total previous certified).

- Clause 30.2.1: Amounts subject to retention.
- Clause 30.2.2: Amounts not subject to retention.
- Clause 30.3: The value of off-site materials and goods to be included where listed in the Contract Bills, provided the conditions in this clause fulfilled (note bond).
- Clause 30.4: Calculation of Retention (half Retention released in interim payment immediately following Practical Completion).
- Clause 35.13: Payments to Nominated Sub-contractors and Employer's right to make payment direct to Nominated Sub-Contractors and deduct from sums due to the Contractor, where Nominated Sub-Contractors are not paid by the Contractor.

2. Mobilisation (Advance) Payments

Clause 30.1.1.6: If an advance payment is provided for, this is to be paid as stated in the Appendix and reimbursed as provided for in the Appendix (note bond).

3. Bond in lieu of retention

An alternative to retention is provided in JCT amendment, Optional clause 30.4A. This provides that the provisions relating to retention do not apply, subject to the Contractor providing a bond in lieu of retention in the stated form, the Employer. The amount of retention that would, otherwise, have been deducted must still be calculated and stated by the Architect or, if requested, the Quantity Surveyor.

4. The final payment

Clause 30.6: Rules for adjusting the Contract Sum (a lump sum plus add and omits).

Clause 30.8: The Final Certificate states the Contract Sum as adjusted and the total amount previously certified as due. The balance of these sums is payable by the Employer or the Contractor as the case may be.

The procedure relating to the issue of the Final Certificate is as follows:

- Clause 30.6: The Contractor provides documentation necessary for the adjustment of the Contract Sum including in respect of any Nominated Sub-Contractor/Supplier accounts, within 6 months of Practical Completion. Within 3 months of receipt of these documents the Architect/Quantity Surveyor ascertains the Contractor's loss and expense and the Quantity Surveyor prepares a statement of all adjustments to the Contract Sum, these being forwarded to the Contractor with relevant extracts to any Nominated Sub-Contractors.
- Clause 30.7: The Architect issues an Interim Certificate (the last) not less than 28 days before issue of the Final Certificate showing gross valuation inclusive of the finally adjusted or ascertained sub-contract sums for Nominated Sub-Contractors.
- Clause 30.8: The Architect issues the Final Certificate stating the adjusted Contract Sum, basis of calculation and the amounts previously certified, not later than 2 months after the end of the Defects Liability Period (see clause 17), the date of issue of the Certificate of Completion of Making Good Defects (see clause 7.4) or the date on which the Contractor is sent the Architect/Quantity Surveyor's ascertainment of its loss and expense and the Quantity Surveyor's statement of all adjustments to the Contract Sum, whichever is the latest.
 - Date of issue is the due date, final date for payment is 28 days from date of issue. Simple interest payable if payment late.
 - Not later than 5 days after date of issue, the Employer to issue a notice to the Contractor specifying the amounts proposed to be paid and basis of payment.
 - Any notice of withholding payment to be issued by the Employer not later than 5 days before the final date for payment.
- Employer to pay the amount stated as due in the Final Certificate unless a notice specifying the amount proposed to be paid or notice of withholding payment issued.

5. Restrictions on payment

Clause 30A and clause 31. Restrictions on payments where the Employer is a contractor for the purpose of the Corporation Taxes Act 1988, and the Income Tax (Sub-Contractors in the Construction Industry) Regulations 1993, as amended (the Construction Industry Scheme). No payments to be made in the absence of a valid Authorisation from the Contractor, as provided for

in that legislation).

SECTION E: RISKS AND SANCTIONS

1. Time risks

Clause 25: The Contractor's entitlement to an extension to the Completion Date where delayed by on or more of the listed Relevant Events (neutral events, fault events, see clauses 25.4, 8.5, 34.3.2 and 42.16). See also extensions of the period for completion of Nominated Sub-Contractor's work, clause 35.14.

The procedure for seeking and giving of extensions of time is as follows:

- Clause 25.2: The Contractor is to notify the Architect forthwith in writing if it becomes reasonably apparent that the progress of the Works is, or is likely to be delayed, giving particulars, and copying that notice to any Nominated Sub-Contractor concerned. The contractor must update the Architect with further notices as necessary
- Clause 25.3.1: If in the Architect's opinion the events relied on by the Contractor in its notice are Relevant Events (see clause 25.4; note catch all at clause 25.4.19, note also clause 42.16) and these are likely to delay the Completion date, the Architect must give the Contractor a fair and reasonable extension of time (using the net extension method) by fixing a new Completion Date, stating which relevant events and whether instructions omitting work have been taken into account. If the Architect does not consider an extension appropriate he must notify the Contractor of this, generally within 12 weeks of the Contractor's notice or not later than the Completion Date, if sooner. The Architect must also notify any Nominated Sub-Contractors of his decisions (see clause 25.3.5).
- Clause 25.3.2: The Architect can fix a completion date earlier than that previously fixed but not earlier than the Date for Completion (see clause 25.3.6) or so as to shorten an agreed extension (see clause 13A)
- Clause 25.3.3: If the Completion Date occurs before Practical Completion, the Architect may, but only within 12 weeks of Practical Completion, fix a later or an earlier Completion Date than that previously fixed, if in his opinion this is fair and reasonable or may confirm the Completion Date previously fixed, but may not fix a date earlier than the Date for Completion (see clause 25.3.6) or so as to shorten an agreed extension (see clause 13A). The Architect must also notify any Nominated Sub-Contractors of his decisions (see clause 25.3.5).
- Clause 25.4: The Contractor must, nevertheless, use its best endeavours to prevent delay and to do all that may be reasonably required to the satisfaction of the Architect to proceed with the Works.

Clause 24: Damages for non-completion by the Completion Date:

- Clause 24.1: If the Works are not completed by the Completion Date the Architect issues a certificate to that effect:
- Clause 24.2: Then the Employer may by writing, require the Contractor to pay or allow liquidated and ascertained damages at the rate stated in the Appendix for the period between the Completion Date and the date of Practical Completion and may deduct that amount from sums otherwise due to the Contractor, provided that sums to be deducted for the Final Certificate must be notified to the Contractor not later than 5 days before the final date for payment of the amount due under that Certificate. These rights are adjusted if a subsequent extension of time is granted.

- These procedures will be ineffective if they are not operated correctly, if the rate stated in the Appendix is a penalty (a sum extravagant in amount compared to the greatest loss that could have resulted from the breach, a sum imposed to terrorise the Contractor into performing, rather than a genuine pre-estimate of the damages likely to be suffered) or if the contract machinery for fixing the Completion Date becomes inoperative.

2. Cost risks

Clause 26: Adjusting the Contract Sum for direct loss and/or expense caused whether by postponement of possession or where the listed matters (fault events, see clause 26.2, and clauses 8.5, 34.3.1, and 42.16) materially affect the progress of the Works.

The procedure for seeking and awarding loss and/or expense is as follows:

- Clause 26.1: If upon the Contractor's written application, which must be made promptly (see clause 26.1.1) and be particularised (see clauses 26.1.2 and 26.1.3), the Architect is of the opinion that the Contractor has or is likely to incur direct loss and/or expense, for which it will not be reimbursed under any other provision of the Contract, as a result of possession of the site being deferred (clause 23.1.2) or because regular progress of the Works or part of the Works has been or is likely to be materially affected by one of the listed matters (see clause 26.2; note catch all. at clause 26.2.11) he must from time to time ascertain that loss and/or expense or instruct the Quantity Surveyor to do so; the ascertained amount being added to the Contract Sum (see clause 26.6).
- Clause 26.4.1: The Contractor must pass to the Architect applications by Nominated Sub-Contractors to the Contractor for loss and expense where these concern matters for which the Employer is responsible , such applications being dealt with similarly to the Contractor's applications.
- Clause 26.3: If necessary for the ascertainment of loss and/or expense, the Architect must advise the Contractor in writing of what extension of time he has granted in respect of those Relevant Events that are also matters under clause 26 (see also clause 26.4.2).

Clause 37: Adjusting the Contract Sum for price and tax changes (fluctuations).

3. Property in goods and materials

Clause 16.1: Passing of property in unfixed materials and goods on site (note clause 19.4).

Clause 16.2: Passing of property in materials and goods off site (note clauses 19.4 and 30.3).

4. Inadequate performance

Clause 4.1.2: The Employer's power to engage others to carry out work at the Contractor's expense, where the Contractor fails to comply with an Architect's Instruction and with a subsequent written notice from the Architect requiring such compliance.

Clause 8.3: The Architect's power to order the opening up for inspection and/or for testing of work.

Clause 8.4: Removal of, or reduction of price to reflect defective work. The Architect's power to order further opening up for inspection and/or testing where work found to be defective (note Code of Practice and time and money consequences, clauses 25.4.5.2, 26.2.2).

Clause 30.9: Restrictions on the Contractor's liability following issue of the Final Certificate (note clause 30.10).

5. Sanctions for inadequate performance/insolvency

Determination by the Employer (Contractor responsible)

Clause 27.2: The Employer may, but not unreasonably or vexatiously (see clause 27.2.4), determine the Contractor's employment where it commits a specified default (clause 27.2.1). This right is dependent on strict compliance with the following procedure:

- Clause 27.2.1: The Architect giving (see clause 27.1) the Contractor a notice specifying its defaults
- Clause 27.2.2: The Contractor continuing a specified default for 14 days from receipt of the notice. Whereupon the Employer may, on or within 10 days from the expiry of that period, by further notice determine the employment of the Contractor
- Clause 27.2.3: The Employer may also give notice determining the employment of the Contractor where the default is ended or the notice is not given, but a specified default is repeated.

Clause 27.3: The Contractor's employment is determined automatically, subject to the possibility of reinstatement by agreement, if it is subject to certain of the listed insolvency events (see clause 27.3.3). In the case of the other listed insolvency events (see clause 27.3.1) it may be determined by the Employer (see clauses 27.3.4 and 27.3.5) by notice at any time.

Clause 27.4: The Employer may determine the Contractor's employment where the Contractor takes or gives bribes.

Clause 27.6: Rights of the parties following determination of the Contractor's employment under clause 27. The Contractor leaves site and no further sums are paid to the Contractor until the Works are completed by others, whereupon the Employer can deduct his losses from sums that would otherwise be due to the Contractor. The Employer may also have a common law action in damages for breach of contract. Note also the Employer's power, other than where an insolvency event, to take over sub-contracts and supply contracts and pay sub-contractors and suppliers direct (deducing such payments from sums otherwise due to the Contractor) (Clause 27.5.2).

Clause 27.7: Deals with the situation where the Employer decides not to complete the Works following determination of the Contractor's employment under clause 27.

Suspension by the Contractor for non payment of amounts due

Clause 30.1.4: The Contractor's right to suspend for not payment of amounts due and not the subject of a notice of withholding payment, if default continues for 7 days of a contractor's notice of intention to suspend. The right to suspend ceases on payment being made.

Determination by the Contractor (Employer responsible)

Clause 28.2: The Contractor may, but not unreasonably or vexatiously (see clause 28.2.6), determine the Contractor's employment where the Employer commits a specified default (clause 28.2.1) or a specified suspension event occurs (clause 28.2.2). This right is dependent on strict compliance with the following procedure:

- Clause 28.2: The Contractor giving (see clause 28.1) the Employer a notice specifying the defaults or suspension event

- Clause 28.2.3: The Employer continuing a specified default or the specified suspension event continuing for 14 days from receipt of the notice. Whereupon the Contractor may, on or within 10 days from the expiry of that period, by further notice determine the employment of the Contractor
- Clause 28.2.4: The Contractor may also give notice determining the employment of the Contractor where the default is ended or the suspension event ceases, or the notice is not given, but a specified default or suspension event is repeated.

Clause 28.3: The Contractor may determine the Contractor's employment if the Employer is subject to a listed insolvency event (see clause 28.3.1); the Contractor's obligation to carry out and complete the Works being suspended meantime.

Clause 28.4: Rights of the parties following determination of the Contractor's employment under clause 28. The Contractor leaves site and is entitled to payment for all work properly executed and for materials on site at that date. The ascertainment to be on the same basis as if the contract had not been determined. The Contractor is also entitled to compensation for removal costs, direct loss and/or damages due to the determination and for the cost of materials properly ordered. The Contractor may also have a common law action in damages for breach of contract.

Determination by either party (suspension for neutral events)

Clause 28A.1: Either party may, but not unreasonably or vexatiously (see clause 28A.1.3), determine the Contractor's employment where the Works are suspended for a continuous period longer than that stated in the Appendix, because of a specified event (clause 28A.1.1, but note clause 28A.1.2). This right is dependent on strict compliance with the following procedure:

- Clause 28A.2: That party giving the other party a notice stating that unless the suspension is terminated within 7 days after receipt the employment of the Contractor will determine; determination occurring if the suspension is not terminated within this period

Clause 28A.5: Rights of the parties following determination of the Contractor's employment under clause 28A (see also clause 28A.4). These rights are similar to those that apply where the Contractor determines its employment under clause 28.

6. Injury to persons or property

Injury to persons or property other than the Works

Clause 20.1: The Contractor's indemnity to the Employer in respect of injury or death to persons.

Clause 20.2: The Contractor's indemnity to the Employer in respect of damage to property other than the Works during construction (see clause 20.2) and damage to property caused by the Specified Perils (see clause 22C.1)

Clause 21.1: The Contractor's obligation to insure the clause 20 indemnities and provide evidence of insurance.

Clause 21.2: The Contractor's obligation (optional) to take out joint names insurance against damage to property caused by collapse, vibration, etc.

Injury to the Works

Clause 22.1: There are three alternative regimes for insuring the risk of damage to the Works in the joint names of the parties (see clause 22.2 and 22.3), the insurance being required until Practical Completion (see clauses 22A.1, 22B.1, 22C.1 and 22C.2, see also clause 18.1.3).

- Clause 22A: Erection of new buildings, All Risks (see clause 22.2) insured by the

Contractor. The Contractor bears the excess and has the risk of any insurance money shortfall (see clause 22A.4.5), other than in respect of uninsured losses due to the withdrawal of terrorism cover (see clause 22A.5).

- Clause 22B: Erection of new buildings, All Risks (see clause 22.2) insured by the Employer. The Employer bears the excess and has the risk of insurance money shortfall (see clause 22B.3.5) including the risk of uninsured losses due to the withdrawal of terrorism cover (see clause 22B.4).
- Clause 22C: Existing structures (Specified Perils, see clauses 1.3 and 22C.1) and Works in or extensions to existing structures (All Risks, see clause 22.2) insured by the Employer. The Employer is entitled to determine the Contractor's employment if insured risk causes loss or damage affecting the work executed (see clause 22C.4). The Employer bears the excess and risk of any insurance money shortfall (see clause 22C.4.4) including the risk of uninsured losses due to the withdrawal of terrorism cover (see clause 22C.5, note also clause 22C.1). It may not always be possible to obtain such insurance on a joint names basis.

Employer's loss of liquidated damages

Clause 22D: The Contractor's obligation (optional) to insure the Employer for loss of his entitlement to liquidated damages in the event of the Contractor being entitled to an extension of time due to loss or damage to the Works, etc. caused by the Specified Perils (see clauses 1.3 and 25.4.2).

Joint Fire Code

Clause 22FC: Optional procedures where the Joint Code of Practice on the Protection from Fire of Construction Sites and Buildings Undergoing Renovation applies. This is a Code of Practice promulgated by insurers to seek and minimise such risks. If applicable, both Employer and Contractor are required to comply with the Code.

SECTION F: DISPUTE RESOLUTION

Article 5: The Adjudication agreement.

Article 7A: The Arbitration agreement.

Article 7B: Litigation option.

Clause 41A: Adjudication procedures, enforcement and effect on the parties (note clause 30.9 and the Adjudication Agreement, and special procedures where dispute concerns opening up of work, clause under 8.4.4, see clause 41A.5.8). See also the Adjudication Agreement (published separately).

Clause 41B: Arbitration, procedures and powers (note clause 30.9).

Clause 41C: Legal proceedings (see note on choice between arbitration and litigation).

INTRODUCTORY GUIDE TO JCT CONTRACTS

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SESSION 3(1): MW98: THE CONDITIONS

SECTION A: THE PARTIES' PRIMARY OBLIGATIONS

1. What is to be provided?

The Contractor's obligations as regards the Works:

- Clause 1.1: The Contractor's primary obligation to carry out and complete the Works (see 1st Recital), the quality and standards to be achieved (both objective and subjective). The Contractor's obligation to comply with the Principal Contractor's Health and Safety Plan, if the full CDM Regulations are applicable.
- Clause 1.4: The Contractor obligation, if the full CDM Regulations do not apply, to notify the Health and Safety Executive of the project before commencing the Works.
- Clause 3.5: The Contractor's obligation to comply with written instructions from the Architect.
- Clause 5.1: The Contractor's obligation to comply with the Statutory Requirements.
- Clauses 5.7, 5.8, 5.9: The Contractor's obligations in, where appointed Principal Contractor, in respect of the CDM Regulations, and to provide information for the Health and Safety File.

Architect's/Employer's obligations as regards the Works:

- Clause 1.2: The Architect's (as agent) obligation to provide information to the Contractor necessary for the proper carrying out of the Works, and to issue certificates and confirm instructions in writing.
- Clause 3.5: The Architect's power to issue written instructions to the Contractor (see, for example, clauses 2.5(?), 3.4, 3.6, 3.7, 4.1, 5.1, 5.9(?), 6.3B), and obligation to confirm oral instructions in writing within 2 days. (Issuing a drawing is not issuing an instruction, what of site meeting minutes?)
- Clause 3.7: The Architect's obligation to issue instructions for the expenditure of provisional sums.
- Clause 4.1: The Architect's obligation to correct inconsistencies in or between the Contract Drawings, the Contract Specification and the schedules (note also clause 5.1).
- Clause 5.6: The Employer's obligations in respect of the Planning Supervisor and, if the Contractor is not the Principal Contractor, the Principal Contractor.

Contractor's obligations after completion of the Works:

- Clause 2.5: The Contractor's obligation to make good certain defects, shrinkages or faults in the works appearing within the specified period after practical completion (the defects liability period (not periods!)).

Implied obligations:

- Implied obligations of the Contractor as regards materials, satisfactory quality, probably no fitness for purpose obligation, see Supply of Goods and Services Act 1982, Part I.
- Implied obligation of the Employer not to hinder or prevent the Contractor from carrying out and completing the Works.
- Implied obligation of the Employer not to not interfere with the exercise of discretion given to the Architect under the Contract (see also clause 7.2.1.2).

2. When?

Clauses 1.1, 2.1: Diligently from the date of commencement to the date of completion. (possession cannot be deferred, see clauses 3.6, 7.3.1.2), as extended, see clause 2.2.

Clause 2.4: The Architect certifies the date of practical completion when in his opinion this is achieved. There is no provision enabling the Employer to take possession of part or parts of the Work before practical completion.

Clause 2.5: The Architect certifies the date on which the Contractor has complied with his obligations to make good defects after practical completion (certificate of making good defects).

3. How much?

Article 2: The lump sum stated (see clause 4.7).

- This is payable for constructing the Contract, Drawings, Contract Specification and the schedule (see clause 4.1, note also clause 5.8).
- It is adjustable (see clauses 3.6, 3.7, 4.1, 4.6 (Supplemental Condition A), 5.1(?)).
- If the Employer is a contractor, the statutory tax deduction scheme applies (see clause 5.3, Supplemental Condition C).
- VAT is, if applicable, payable in addition (see Article 2, clause 5.2)

SECTION B: ALTERING THE CONTRACTED FOR PERFORMANCE

1. The extent of the power

Clause 3.6: The Architect's power to issue instructions varying the Works.

Clause 3.7: Instructions concerning the expenditure of provisional sums.

2. The cost consequences

Clause 3.6: Procedures for valuing the work content of variations and expended provisional sums (work content plus disruption costs).

3. The time consequences

Clause 2.2: Procedures for determining the time consequences.

4. Pre-agreeing the cost consequences

Clause 3.6: The cost consequences can be agreed between the Architect and the Contractor prior to the Contractor carrying out the instruction.

SECTION C: CONTROLLING AND MONITORING THE MANNER OF PERFORMANCE

1. Instructions to the Contractor

Clause 3.5: The Architect's power to issue written instructions to the Contractor (see, for example, clauses 2.5, 3.4, 3.6, 3.7, 4.1, 5.1, 5.9(?), 6.3B), and obligation to confirm oral instructions in writing within 2 days (issuing a drawing is not issuing an instruction, what of site meeting minutes?).

- Not all communications with the Contractor are instructions (see, for example, clauses 1.2, 2.2, 2.4, 3.2.1, 4.2.1, 7.2.1).
- In certain, limited, situations the Employer communicates directly with the Contractor (see, for example, clauses 1.3, 2.3, 4.4.1, 4.4.2, 4.5.1.2, 4.5.1.3, 7.2.1).
- The Planning Supervisor can also communicate with the Contractor (see clause 5.9).

2. Monitoring and controlling performance

Clause 1.8: Third party rights excluded (see Contract (Rights of Third Parties) Act 1999).

Clause 3.3: Contractor to have competent person on site.

Clause 3.4: The Architect's power to exclude persons from the Works.

Clause 3.1: Limits on rights of assignment.

Clause 3.2: Limits on the Contractor's right to sub-contract (see also clause 3.2.2, payment protection for sub-contractors).

SECTION D: VALUATION AND TIMING OF PAYMENTS

1. Progress payments

Clauses 4.2, 4.4: The timing of and payment in respect of interim certificates.

- Interim certificates stating amount to be paid, to what it relates and the basis on which it was calculated to be issued at intervals of 4 weeks calculated for the date for commencement (clause 4.2.1).
- Date of issue is the due date. The final date for payment is 14 days from date of issue. Simple interest payable if payment late (see clause 4.2.2).
- Not later than 5 days after date of issue, the Employer to issue a written notice to the Contractor specifying the amounts proposed to be paid (see clause 4.4.1).
- Any notice of withholding payment to be issued by the Employer not later than 5 days

before the final date for payment (clause 4.4.2).

- Employer to pay the amount stated as due in the certificate unless a notice specifying the amount proposed to be paid or notice of withholding payment issued (clause 4.4.3).

Clause 4.2.1: Amounts to be included in interim certificates (all subject to retention).

- Value of the Works properly executed including amounts ascertained or agreed in respect of variations and expended provisional sums.
- Value of any materials and goods reasonably and properly brought on site for the purpose of the Works, provided adequately stored and protected against weather and other casualties (note property problems).

From these amounts is deducted the retention (usually 5%) and the total due to the Contractor under previous interim certificates (each valuation based on measurement and value using, in practice, any pricing information in the Contract Documents, is always based on the total work completed, less previous valuations).

2. The penultimate certificate

Clauses 4.3, 4.4: The timing of and payment in respect of the penultimate certificate.

- The penultimate certificate stating amount to be paid, to what it relates and the basis on which it was calculated to be issued within 14 days after the date of practical completion.
- Date of issue is the due date. The final date for payment is 14 days from date of issue. Simple interest payable if payment late (see clause 4.2.2).
- Not later than 5 days after date of issue, the Employer to issue a written notice to the Contractor specifying the amounts proposed to be paid (see clause 4.4.1).
- Any notice of withholding payment to be issued by the Employer not later than 5 days before the final date for payment (clause 4.4.2).
- Employer to pay the amount stated as due in the certificate, unless a notice specifying the amount proposed to be paid or notice of withholding payment issued (clause 4.4.3).

Clause 4.3: Amounts to be included in the penultimate certificate (all subject to half retention, usually 2.5%).

- The total amount to be paid to the Contractor under this contract so far as that amount is ascertainable at the date of practical completion, including amounts ascertained or agreed in respect of variations and expended provisional sums.
- This includes tax levy fluctuations, if applicable (see clause 4.6).

From these amounts is deducted the total due to the Contractor under previous interim certificates (the clause appears envisage a calculation based on the Contract sum plus add and omits, not measurement and value).

3. The final certificate

Clause 4.5: The final certificate states the amount remaining due to the Contractor or due to the Employer as the case may be. This clause also envisages as calculation based on the Contract sum plus add and omits, not measurement and value but finalised in the light of documentation

received from the Contractor. Even if the figures stay the same the Contractor will obtain release of the final portion of retention. Although not expressly stated, the certificate should also show the amounts previously certified as due to the Contractor, the difference being the amount remaining due.

The procedure relating to the issue of the Final Certificate is as follows:

- Clause 4.5.1.1: The Contractor provides documentation reasonably required for the computation of the amount to be certified within 3 months of Practical Completion.
- Clause 4.5.1.1: Within 28 days of receipt of such documentation, and provided that the certificate of making good defects has been issued (clause 2.5), the Architect issues the final certificate showing the amount remaining due and stating to what the amount relates and the basis of which it was calculated.
- Date of issue is the due date, final date for payment is 14 days from date of issue. Simple interest payable if payment late (Clauses 4.5.1.3, 4.5.2).
- Not later than 5 days after date of issue, the Employer to issue a notice to the Contractor specifying the amounts proposed to be paid and basis of payment (clause 4.5.1.2).
- Any notice of withholding payment to be issued by the Employer not later than 5 days before the final date for payment (clause 4.5.1.3).
- Employer to pay the amount stated as due in the final certificate unless notice specifying amount proposed to be paid or notice of withholding payment is issued (clause 4.5.1.4).

The final certificate is not stated to be conclusive as to any matters.

4. Restrictions on payment

Clause 4A, 5.3 and Supplemental Condition C. Restrictions on payments where the Employer is a contractor for the purpose of the Corporation Taxes Act 1988, and the Income Tax (Sub-Contractors in the Construction Industry) Regulations 1993, as amended (the Construction Industry Scheme). No payments to be made in the absence of a valid Authorisation from the Contractor, as provided for in that legislation).

SECTION E: RISKS AND SANCTIONS

1. Time risks

Clause 2.2: The Contractor's entitlement to an extension to the date for completion where delayed for reasons beyond its control including compliance with Architect's instructions whose issue is not due to a default of the Contractor. Reasons within in the control of the Contractor include default by the Contractor of those employed or engaged by him, or by any supplier.

The procedure for seeking and giving of extensions of time is as follows:

- The Contractor notifies the Architect in writing if it becomes apparent that the Works will not be completed by the existing date for completion because of such reasons.
- Upon such notification the Architect's makes, in writing, a reasonable extension of time for completion of the Works (there is no power to reduce the period).

Clause 2.3: Damages for non completion. If the Works are not completed by the date for completion (including any extension to it) the Employer may recover liquidated damages at the contract rate for the Contractor or deduct such damages from amounts due to the Contractor

under the Contract. In the latter case, the Employer must comply with provisions for giving notice of withholding payments, and, in the case of the final certificate give such a notice not later than the date of issue of that certificate.

2. Cost risks

Clause 3.6: The Contractor is entitled to payment for direct loss and expense incurred due to the regular progress of the works being affected by compliance with an Architect's instruction varying the Works or, if applicable, where the Employer has failed to comply with its obligations in respect of the Planning Supervisor or Principal Contractor (see clause 5.6).

Clause 4.6: Adjusting the Contract Sum for price and tax changes (fluctuations).

If the Contractor suffers loss or damage through other defaults of the Employer, its remedy is by action for breach of contract.

3. Property in goods and materials

The contract says nothing about the passing of property in goods or materials, the common law rules apply.

4. Inadequate performance

Clause 3.5: The Employer's power to engage others to carry out work at the Contractor's expense, where the Contractor fails to comply with an Architect's instruction, despite a subsequent written notice from the Architect requiring compliance.

Clauses 3.5, 3.6: The power to issue instructions is wide enough to enable the Architect to issue instructions concerning the opening up of work and the removal of defective work. The Contract is silent of the cost and time consequences of issuing such instructions.

5. Sanctions for inadequate performance/insolvency

Determination by the Employer (Contractor responsible)

Clause 7.2.1: The Employer may, but not unreasonably or vexatiously, determine the Contractor's employment where it makes default by failing to proceed diligently with the Works or by wholly or substantially suspending the carrying out of the Works before practical completion or by failing to comply with its contractual obligations as regard the CDM Regulations. This right is dependant on strict compliance with the following procedure (see also clause 7.1. for the manner of giving the required notices):

- The Architect giving the Contractor a written notice specifying its default and requiring it to be ended.
- The Contractor continuing the default for 7 days from receipt of the notice.
- Whereupon the Employer may by further notice determine the employment of the Contractor, determination being effective on receipt of this further notice.

Clause 7.2.2: If the Contractor commits a specified act of insolvency the Employer may by written notice determine the Contractor's employment under the Contract (see clause 7.1. for the manner of giving the required notices). Determination takes effect on the receipt of the notice.

Clause 5.5: The Employer may cancel the Contract if the Contractor takes or gives bribes.

Clause 7.2.3: Rights of the parties following determination of the Contractor's employment under

clause 7.2. The Contractor leaves site and no further sums are paid to the Contractor until the Works are completed by others, whereupon the Employer can deduct his losses from sums otherwise due to the Contractor. The Employer may also have a remedy for breach of contract at common law (see clause 7.2.4)

Suspension by the Contractor for non payment of amounts due

Clause 4.8: The Contractor's right to suspend performance of its obligations for non payment of amounts due and not the subject of a notice of withholding payment, if default continues for 7 days of a contractor's notice of intention to suspend. The right to suspend ceases on payment being made.

Determination by the Contractor (Employer responsible)

Clause 7.3.1: The Contractor may, but not unreasonably or vexatiously determine the Contractor's employment where the Employer commits one or more of the specified defaults (clauses 7.3.1, 7.3.2, 7.3.3, 7.3.4). This right is dependent on strict compliance with the following procedure (see clause 7.1. for the manner of giving the required notices):

- The Contractor giving the Employer a written notice specifying the default and requiring it to be ended.
- The Employer continuing the default for 7 days from receipt of the notice. Whereupon the Contractor may, on or within 10 days from the expiry of that period, by further notice determine the employment of the Contractor
- Whereupon the Contractor may by further notice determine the employment of the Contractor, determination being effective on receipt of this further notice.

Clause 7.3.2: If the Employer commits a specified act of insolvency the Contractor may by written notice determine the Contractor's employment under the Contract (see clause 7.1. for the manner of giving the required notices). Determination takes effect on the receipt of the notice.

Clause 7.3.3: Rights of the parties following determination of the Contractor's employment by the Contractor. The Contractor leaves site and is entitled to payment for the total value of work properly executed and materials on site at that date. The payment to be ascertained on the same basis as if the contract had not been determined. The Contractor is also entitled to compensation for removal costs, direct loss and/or damages due to the determination. and the cost of materials properly ordered. The Contractor may also have a remedy in common law for breach of contract (see clause 7.3.4).

6. Injury to persons or property

Injury to persons or property other than the Works

Clause 6.1: The Contractor's indemnity to the Employer in respect of injury or death to persons. The Contractor's obligation to back this indemnity with insurance.

Clause 6.2 The Contractor's indemnity to the Employer in respect of damage to property other than the Works or the existing structures which the Employer is required to insure (see clause 6.3B). The Contractor's obligation to back this indemnity with insurance.

Injury to the Works

Clause 6.3: There are two alternative regimes for insuring the risk of damage to the Works. In either case the insurance must be in the joint names of the parties (no subrogation) and is required until practical completion. Thereafter the Employer insures under his normal policies.

- Clause 6.3A: Erection of new buildings. Insurance of the Works and unfixed materials and goods against the listed perils to be arranged by the Contractor. If the Works are

damaged by one of the listed perils the contractor is paid the insurance monies against certificates issued by the Architect. The Contractor bears the excess and has the risk of any insurance money shortfall.

- Clause 6.3B: Alterations to existing structures. Insurance of the existing structures and of Works and unfixed materials and goods against the listed perils to be arranged by the Employer. If the Works are damaged by one of the listed perils they are reinstated on instruction by the Architect, these instructions being valued as variations. The Employer bears the excess and has the risk of any insurance money shortfall. Such insurance may be difficult to obtain.

In either case it is best to operate a separate system of certification for the reinstated work. If the existing structures are destroyed the contract may be frustrated (but see clause 7.3.1.3).

Clause 6.4: The party arranging insurance to provide, if requested by the other party, evidence that the insurance is in force.

SECTION F: DISPUTE RESOLUTION

Article 6: The Adjudication agreement. See clause 8.1 and Supplemental Condition D (note also the separately published Adjudication Agreement).

Article 7A: The Arbitration agreement. See clause 8.2 and Supplemental Condition E.

Article 7B: Litigation option. See clause 8.3.

Article 7C: If neither 7A nor 7B selected, 7A applies.

INTRODUCTORY GUIDE TO JCT CONTRACTS

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November 2002

SESSION 3(2): IFC 98: THE CONDITIONS: PART I

SECTION A: THE PARTIES' PRIMARY OBLIGATIONS

1. What is to be provided?

The Contractor's obligations as regards the Works:

- Clauses 1.1 and 1.2: The Contractor's primary obligation to carry out and complete the Works as varied (see article 1 and 1st recital, clauses 3.6, 3.8). The quality and standards to be achieved (both objective and subjective, see also clause 4.7.1).
- Clause 5.1: The Contractor's obligation to comply with the Statutory Requirements (but note clauses 5.2, 5.3 and 5.4).
- Clause 5.7.2-5.7.4: The Contractor's obligations, where appointed Principal Contractor, as regards the CDM Regulations and the Health and Safety Plan, and, whether or not appointed Principal Contractor, to provide information for the health and safety file.
- Clause 3.3.7: Limitation on the Contractor's liability in respect of Named Sub-Contractor's Work (principally concerning design)

Architect's/Employer's obligations as regards the Works:

- Clause 1.4: The Architect's obligation (as agent) to correct inconsistencies, etc. in or between the Contract Documents.
- Clauses 1.7.1, 1.7.2: The Architect's (as agent) obligation to provide information to the Contractor in accordance with the Information Release Schedule, otherwise where reasonably necessary to explain and amplify the Contract Drawings, and to issue instructions to enable the Contractor to carry out its obligations.
- Clause 3.9: The Architect's (as agent) obligation to provide levels.
- Clause 5.7.1: The Employer's obligations to ensure that the duties of the Planning Supervisor and the Principal Contractor (where not the Contractor) are carried out.

Contractor's obligations after completion of the Works:

- Clause 2.10: The Contractor's obligation to make good certain defects, shrinkages or faults in the works appearing not later than 14 days after the expiry of the Defects Liability Period (one period).

Implied obligations:

- Implied obligations of the Contractor as regards materials, satisfactory quality, probably no fitness for purpose obligation, see Supply of Goods and Services Act 1982, Part I.
- Implied obligation of the Employer not to hinder or prevent the Contractor from carrying out and completing the Works.

2. When?

Clause 2.1: Regularly and diligently from the Date of Possession (note limited, optional, power of the Employer to defer giving possession, clause 2.2) to the Completion Date as extended, if at all, under clause 2.3.

Clause 2.6: If the Contractor fails to complete by the Completion Date the Architect issues a certificate to that effect.

Clause 2.9: The Architect certifies the date of Practical Completion when, in his opinion, this is achieved and the Contractor has provided information reasonably required by the Planning Supervisor for the preparation of the health and safety file (see clause 5.7.4). Note the Contractor's limited obligations thereafter (see clause 2.10); the architect issuing a certificate when these have been discharged.

Clause 2.11: With the Contractor's consent, the Employer can take possession of part or parts of the Work before Practical Completion, Practical Completion of such parts, and its consequences, occurring when taken over. If phased completion is required the Sectional Completion Supplement should be used.

3. How much?

Article 2 : The Contract Sum.

- This is payable for constructing either the Contract Bills (recital 2A, clause 1.2), or the Contract Documents, taken together (recital 2B, clause 1.2, but note hierarchy between Drawings and Specification/Schedules), see also clause 4.1.
- It is adjustable (see clauses 3.7 (options A and B), 4.5, 4.11).
- It is exclusive of VAT, see clause 5.5.

SECTION B: ALTERING THE CONTRACTED FOR PERFORMANCE

1. The extent of the power

Clause 3.6: The Architect's power to issue instructions varying the Works and certain obligations or restrictions concerning the manner of working (see also deemed variations under clauses 1.4, 3.3.1, 5.4.3, 6.3B.3.5 and 6.3C.4.5).

Clause 3.8: The Architect's obligation (as agent) to issue instructions concerning the expenditure of provisional sums. See also, work executed for which an Approximate Quantity is included in the Contract Documents. (note SMM7 and footnote to clause 8.3)

Clause 3.15: The Architect's power to issue instructions regarding the postponement of work to be executed under the Contract (but note clause 2.2).

2. The cost consequences

Clause 3.7: Procedures for valuing the work content of variations. There are two options, Option A (contractor's price statement), Option B (valuation in accordance with the valuation rules). The latter applies if the contractor does not implement Option A.

Clause 4.11: Procedures for determining the disruption costs of variations (note clauses 4.12.5, 4.12.7, and position where clause 3.7, Option A applies).

3. The time consequences

Clause 2.3: Procedures for determining the time consequences (note clause 2.4.5 and position where clause 3.7, Option A applies).

SECTION C: CONTROLLING AND MONITORING THE MANNER OF PERFORMANCE

1. Instructions to the Contractor

Clause 3.5.1: The Contractor's obligation to comply with instructions of the Architect expressly empowered by the Conditions (note clause 3.5.2), other than those concerning changes to "working methods" (see clause 3.6.2) to which reasonable objection is taken.

- Clauses empowering instructions include 1.4, 1.7.2, 2.10, 3.3.1, 3.3.2, 3.3.3, 3.6, 3.9, 3.12, 3.14, 3.15, 5.2(?).
- Not all communications between the Architect and Contractor are instructions (see, for example, clauses 1.6, 1.7, 1.10, 2.3, 2.6, 2.9, 2.11, 3.9, 4.2, 4.3, 4.6, 4.11, 6.3D.1)
- In certain, limited, situations the Employer communicates directly with the Contractor (see, for example, clauses 2.2(?), 7.2.2, 7.3.4), as does the Quantity Surveyor (see for example clause 3.7 (Option A) and the Planning Supervisor (see for example clause 5.7.4).

Instructions are of no effect unless given by the Architect in writing, see clause 3.5.1 (see also clause 3.10, limited status of the Clerk of Works).

Clause 3.5.2: The Contractor may, upon receipt of a purported instruction require the Architect to specify the provision of the Conditions which empowers the issue of that instruction. The instruction being deemed to have been issued under the notified provision unless either party, before compliance, invokes the contract dispute procedures.

2. Miscellaneous management procedures

Clause 1.6: Custody of Contract Documents (note also clause 1.8, limits on their use) and provision of copies to the Contractor.

Clause 1.9: Distribution of Architect's Certificates.

Clause 3.4: Contractor's person in charge and authority to receive instructions and directions.

3. Monitoring performance

Clause 3.10: A Clerk of Works may be appointed as inspector on behalf of the Employer.

4. Controlling who performs and who is entitled to performance

Clause 1.17: Third party rights excluded (see Contract (Rights of Third Parties) Act 1999).

Clause 3.1: Limits on rights of assignment.

Clause 3.2: Limits on the Contractor's right to sub-contract (note terms of sub-contracts imposed by clauses 3.2.1, 3.2.2 and 3.2.3, and the standard form of sub-contract agreement IN/SC).

Clause 3.11: Work carried out by persons engaged by the Employer (note the insurance regime for such work).

Clause 3.3: Procedures for naming and, if necessary, re-naming Sub-contractors. Note the limited circumstances in which naming is possible (clause 3.3.1, linking with the 1st recital, and clause 3.3.2, linking with the expenditure of provisional sums, clause 3.8).

INTRODUCTORY GUIDE TO JCT CONTRACTS

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SESSION 4(2): IFC 98: THE CONDITIONS: PART 2

SECTION D: VALUATION AND TIMING OF PAYMENTS

1. Interim payments

Clauses 4.2(a) and 4.2.3: The timing of and payment in respect of Interim certificates (subject to any agreement as to stage payments).

- Interim Certificates stating amount to be paid and the basis of payment to be issued at the periods stated in the Appendix (monthly unless otherwise stated).
- Date of issue is the due date, final date for payment is 14 days from date of issue. Simple interest payable if payment late.
- Not later than 5 days after date of issue, the Employer to issue a notice to the Contractor specifying the amounts proposed to be paid and basis of payment.
- Any notice of withholding payment to be issued by the Employer not later than 5 days before the final date for payment.
- Employer to pay the amount of Interim Certificate unless a notice specifying the amount proposed to be paid or notice of withholding payment issued, with interest if paid after the final date for payment.

Clause 4.2(c): Interim valuations to be made by the Quantity Surveyor whenever the Architect considers them necessary for the purpose of ascertaining the amount of an interim payment, but the Contractor may submit applications setting out what it considers to be the amount of the valuation.

Clauses 4.2(d), 4.2.1 and 4.2.2: Amounts to be included in Interim Certificates (gross valuation, principally based on work properly completed (calculated by reference to the Contractor's Priced Activity Schedule, if attached) less 5% Retention, less total previous certified).

- Clause 4.2.1: Amounts subject to retention comprise work properly executed, as adjusted for fluctuations, if any, materials and goods reasonably and properly delivered to site, and in the case of listed items, materials and goods off site.
- Clause 4.2.2: Amounts not subject to retention, principally insurance premiums, fluctuations, loss and expense, and works concerning the restoration of insured damage.
- Clause 4.2.1: The value of off-site materials and goods to be included where listed in the Contract Documents, provided the conditions in this clause fulfilled (note bond).

Clause 4.4 (not applicable to Local Authorities): The Employer's interest in the retention to be

fiduciary as trustee for the Contractor, with a right of recourse for payment of amounts he is entitled to withhold or deduct from amounts due to the Contractor.

2. Mobilisation Payments

Clause 4.2(b) (Not applicable to Local Authorities): If an advance payment is provided for, this is to be paid as stated in the Appendix and reimbursed as provided for in the Appendix (note bond).

3. Interim Payment on Practical Completion

Clause 4.3: The timing of and payment in respect of the "penultimate certificate".

- A "penultimate certificate" stating amount to be paid, to what it relates and the basis on which it was calculated to be issued within 14 days after the date of Practical Completion (clause 4.3(a)).
- Date of issue is the due date. The final date for payment is 14 days from date of issue. Simple interest payable if payment late (clause 4.3(e), see also clause 4.2(a)).
- Not later than 5 days after date of issue, the Employer to issue a written notice to the Contractor specifying the amounts proposed to be paid (see clause 4.3(b)).
- Any notice of withholding payment to be issued by the Employer not later than 5 days before the final date for payment (clause 4.3(c)).
- Employer to pay the amount stated as due in the certificate, unless a notice specifying the amount proposed to be paid or a notice of withholding payment issued (clause 4.3(d)).

Clause 4.3(a): Amounts to be included in the penultimate certificate to be assessed on the same basis as interim certificates, with retention on those amounts subject to retention reduced to 2.5%. From these amounts is deducted the total due to the Contractor under previous interim certificates.

4. The final payment

Clause 4.5: Rules for adjusting the Contract Sum (a lump sum plus add and omits).

Clause 4.6.1.1: The Final Certificate states the Contract Sum as adjusted and the total amount previously certified as due, the balance being payable by the Employer or the Contractor as the case may be.

The procedure relating to the issue of the Final Certificate is as follows:

- Clause 4.5: The Contractor provides documentation necessary for the adjustment of the Contract Sum within 6 months of Practical Completion.
- Clause 4.5: Within 3 months of receipt of these documents the Architect/Quantity Surveyor prepares a statement of final valuations for variations, and sends a copy of this, and the computations relating to all other adjustments to the Contract Sum, to the Contractor.
- Clause 4.6.1.1: The Architect issues the Final Certificate stating the adjusted Contract Sum, the basis of calculation and the amounts previously certified. This to be issued not later than 28 days after the date on which the Contractor is sent the Architect/Quantity Surveyor's statement of final valuations for variations and computations relating to all

other adjustments to the Contract Sum or, if later, of issue of the Certificate of Completion of Making Good Defects (see clause 2.10).

- Date of issue is the due date, final date for payment is 28 days from date of issue (clauses 4.6.1.1(?), 4.6.1.3). Simple interest payable if payment late (clause 4.6.2).
- Not later than 5 days after date of issue, the Employer to issue a notice to the Contractor specifying the amounts proposed to be paid and basis of payment (clause 4.6.1.2).
- Any notice of withholding payment to be issued by the Employer not later than 5 days before the final date for payment (clause 4.6.1.3).
- The Employer to pay the amount stated as due in the Final Certificate unless a notice specifying the amount proposed to be paid or a notice of withholding payment issued (clause 4.6.1.4), with interest if paid after the final date for payment.

5. VAT

Clause 5.5: VAT to be paid on certified sums, where properly chargeable (see Supplemental Condition A). If condition A1.1 applies, certificates show the VAT payable. If not, the matter is dealt with between the Contractor and the Employer.

6. Restrictions on payment

Clause 4A, 5.6 and Supplemental Condition B. Restrictions on payments where the Employer is a contractor for the purpose of the Corporation Taxes Act 1988, and the Income Tax (Sub-Contractors in the Construction Industry) Regulations 1993, as amended (the Construction Industry Scheme). No payments to be made in the absence of a valid Authorisation from the Contractor, as provided for in that legislation).

SECTION E: RISKS AND SANCTIONS

1. Time risks

Clause 2.3: The Contractor's entitlement to an extension to the Date for Completion where delayed by on or more of the listed Relevant Events (neutral events, fault events, see clause 2.4).

The procedure for seeking and giving of extensions of time is as follows:

- Clause 2.3: The Contractor is to notify the Architect forthwith in writing if it becomes reasonably apparent that the progress of the Works is, or is likely to be delayed, stating the cause of the delay. The Contractor must also provide information reasonably required by the Architect for the purposes of this clause.
- Clause 2.3 (see also clause 2.5): If in the Architect's opinion any causes of delay relied on by the Contractor in its notice are "relevant events" (see clause 2.4; note catch all, clause 2.4.19) and these are likely to delay the Date for Completion, including any previous extensions to that date, the Architect must give the Contractor a fair and reasonable extension of time (using the net extension method). Where the cause of delay occurs after the date for Completion, including any extension to that date, a more restricted list of relevant events applies (excluding the neutral events). Note also the relationship of this provision with clause 3.7 (Option A).
- Clause 2.3: The Architect may also, up to 12 weeks after Practical Completion, may make an extension of time under this clause whether on reviewing an earlier extension, or otherwise, and whether on not the Contractor has given the requisite notice of delay.

- Clause 2.3: The Contractor must, nevertheless, use its best endeavours to prevent delay and to do all that may be reasonably required to the satisfaction of the Architect to proceed with the Works.

Clauses 2.6, 2.7, 2.8: Damages for non-completion by the Date for Completion.

- Clause 2.6: If the Works are not completed by the Date for Completion, including any extension to that date, the Architect issues a certificate to that effect, the certificate being cancelled in the event of a subsequent extension of time.
- Clause 2.7: Provided such a certificate is issued, and the employer has informed the Contractor in writing before the date of the final certificate that he may seek or deduct liquidated and ascertained damages ("LADs"), the Employer may, not later than 5 days before the final date for payment of the debt due under the final certificate, either require the Contractor to pay the LADs due, or give a notice of withholding payment in respect of those LADs.
- These procedures will be ineffective if they are not operated correctly, if the rate stated in the Appendix is a penalty (a sum extravagant in amount compared to the greatest loss that could have resulted from the breach, a sum imposed to terrorise the Contractor into performing, rather than a genuine pre-estimate of the damages likely to be suffered) or if the contract machinery for extending the Completion Date becomes inoperative.

2. Cost risks

Clauses 4.11 and 4.12: Adjusting the Contract Sum for direct loss and/or expense caused whether by postponement of possession or where the listed matters (fault events only, see clause 4.12) materially affect the regular progress of the Works.

The procedure for seeking and awarding loss and/or expense is as follows:

- Clause 4.11: If upon the Contractor's written application, which must be made promptly, the Architect is of the opinion that the Contractor has or is likely to incur direct loss and/or expense, for which it will not be reimbursed under any other provision of the Contract, as a result of possession of the site being deferred (clause 4.11(a)) or because regular progress of the Works or part of the Works has been or is likely to be materially affected by one of the listed matters (clause 4.11(b), see clause 4.12; note catch all, clause 4.12.11) he must ascertain that loss and/or expense or instruct the Quantity Surveyor to do so; the ascertained amount being payable under interim certificates (see clause 4.2.2) and added to the Contract Sum (see clause 4.5).
- Clause 4.11: The awarding of loss and expense is subject to the proviso that the Contractor shall provide such information required by the Architect, or Quantity Surveyor, as is reasonably necessary for the purposes of this clause.
- Clause 4.11: The entitlement to loss and expense is without prejudice to any other rights or remedies the Contractor may possess.

Clause 4.9: Adjusting the Contract Sum for price and tax changes (fluctuations). There are two options, tax fluctuations and formula fluctuations, see Supplemental Conditions C and D.

3. Property in goods and materials

Clause 1.10: Passing of property in unfixed materials and goods on site to the Employer on payment (note clauses 3.2.2 and 4.2.1(b)).

Clause 1.11: Passing of property in materials and goods off site to the Employer on payment (note also clauses 3.2.2 and 4.2.1(c)).

4. Inadequate performance

Clause 3.5.1: The Employer's power to engage others to carry out work at the Contractor's expense, where the Contractor fails to comply with an Architect's Instruction and with a subsequent written notice from the Architect requiring such compliance.

Clause 3.12: The Architect's power to order the opening up for inspection and/or for testing of work, materials or goods. The cost to be added to the Contract Sum unless allowed for the Contract or the test or inspection shows that the work, materials or goods are not in accordance with the Contract.

Clause 3.13: Where defective work, materials or goods are discovered, the Contractor to advise on what action it proposes to take, at no cost to the Employer, to establish that there are no similar failures in the work. If no such advice is given, or the Architect does not accept it, the Architect may instruct the Contractor as to what measures to take. If the Contractor objects to such an instruction, the matter is referred to the contractual dispute resolution procedures and, if the Architect's instruction is found not to be fair and reasonable, the cost and time consequences of compliance fall to the Employer (see clauses 2.4.6 and 4.12.2).

Clause 3.14: The Architect's power to order the removal of defective work, materials and goods.

Clause 4.7: Restrictions on the Contractor's liability following issue of the Final Certificate, except in respect of matters referred to the contractual dispute resolution procedures within the stipulated periods. No other certificates are conclusive (see clause 4.8).

5. Sanctions for inadequate performance/insolvency

Determination by the Employer (Contractor responsible)

Clause 7.2: The Employer may, but not unreasonably or vexatiously (see clause 7.2.4), determine the Contractor's employment where it commits a specified default (clauses 7.2.1(a)-(e)). This right is dependent on strict compliance with the following procedure (see also the procedures for giving notices in clause 7.1):

- Clause 7.2.1: The Architect giving the Contractor a written notice specifying its defaults
- Clause 7.2.2: The Contractor continuing a specified default for 14 days from receipt of the notice. Whereupon the Employer may, on or within 10 days from the expiry of that period, by further notice determine the employment of the Contractor
- Clause 7.2.3: If a specified default is ended within the relevant period or a notice of determination is not given, but is repeated, the Employer may upon or within a reasonable time of that repetition give notice determining the employment of the Contractor.

Clause 7.3: The Contractor's employment is determined automatically, subject to the possibility of reinstatement by agreement, if it is subject to certain of the listed insolvency events (see clause 7.3.3). In the case of the other listed insolvency events (see clause 7.3.1) it may be determined by the Employer (see clause 7.3.4) by notice at any time. See also the special procedures that govern payment, and the execution of further work (in the latter case see clause 7.5).

Clause 7.4: The Employer may determine the Contractor's employment where the Contractor

takes or gives bribes.

Clause 7.6: Rights of the parties following determination of the Contractor's employment under clause 7.2 to 7.4. The Contractor leaves site and no further sums are paid to the Contractor until the Works are completed by others, whereupon the Employer can deduct his losses from sums that would otherwise be due to the Contractor. The Employer may also have a common law action in damages for breach of contract (see clause 7.8).

Clause 7.7: Deals with the situation where the Employer decides not to complete the Works following determination of the Contractor's employment under clause 27.

Suspension by the Contractor for non payment of amounts due

Clause 4.4A: The Contractor's right to suspend for not payment of amounts due and not subject of a notice of withholding, if default continues for 7 days of a contractor's notice of intention to suspend. The right to suspend ceases on payment being made.

Determination by the Contractor (Employer responsible)

Clause 7.9: The Contractor may, but not unreasonably or vexatiously (see clause 7.9.5), determine the Contractor's employment where the Employer commits a specified default (clauses 7.9.1(a)-(d)) or (clause 7.9.2) a specified event occurs, which causes the whole or substantially the whole of the works to be suspended for a continuous period of a month . This right is dependent on strict compliance with the following procedure. See also the requirements for giving notices in clause 7.1.

- Clauses 7.9.1, 7.9.2: The Contractor giving the Employer a notice specifying the defaults or suspension event.
- Clause 7.9.3: The Employer continuing a specified default or the specified suspension event continuing for 14 days from receipt of the notice. Whereupon the Contractor may, on or within 10 days from the expiry of that period, by further notice determine the employment of the Contractor.
- Clause 7.9.4: The Contractor may also give notice determining the employment of the Contractor where the default is ended or the suspension event ceases, or the notice is not given, but a specified default or suspension event is repeated.

Clause 7.10: The Contractor may determine the Contractor's employment if the Employer is subject to a listed insolvency event (see clause 7.10.1); the Contractor's obligation to carry out and complete the Works being suspended meantime.

Clause 7.11: Rights of the parties following determination of the Contractor's employment under clauses 7.9 or 7.10. The Contractor leaves site and is entitled to payment for all work properly executed and for materials on site at that date. The ascertainment to be on the same basis as if the Contractor's employment had not been determined. The Contractor is also entitled to compensation for removal costs, direct loss and/or damages due to the determination and for the cost of materials properly ordered. The Contractor may also have a common law action in damages for breach of contract (see clause 7.12).

Determination by either party (suspension for neutral events)

Clause 7.13: Either party may, but not unreasonably or vexatiously (see clause 7.13.3), determine the Contractor's employment where the Works are suspended for a continuous period longer than one or three months (depending of the event) because of a specified event (clauses 7.13.1(a)-(f)). But note clause 7.13.2 restricting the Contractor's power to exercise this right. This right is dependent on strict compliance with the following procedure:

- Clause 7.13.1: That party giving the other party a notice stating that unless the

suspension is terminated within 7 days after receipt the employment of the Contractor will determine; determination occurring if the suspension is not terminated within this period

Clauses 7.14-19: Rights of the parties following determination of the Contractor's employment under clause 7.13.1. These rights are similar to those that apply where the Contractor determines its employment under clause 7.9 or 7.10.

6. Injury to persons or property

Injury to persons or property other than the Works

Clause 6.1.1: The Contractor's indemnity to the Employer in respect of injury or death to persons.

Clause 6.1.2: The Contractor's indemnity to the Employer in respect of damage to property other than the Works during construction (see clause 6.1.3) and damage to property caused by the Specified Perils, where clause 6.3C.1 applies (works to existing structures, Employer insures).

Clauses 6.2.1 and 6.2.2: The Contractor's obligation to insure the clause 6.1 indemnities and provide evidence of insurance. Note the Employer's right to take out the necessary insurance, at the Contractor's expense, if the Contractor fails to do so (clause 6.2.3).

Clause 6.2.4: The Contractor's obligation (optional) to take out joint names insurance against damage to property caused by collapse, vibration, etc.

Clause 6.2.5: The above provisions do not apply to the Excepted Risks (nuclear incidents and pressure waves from aircraft).

Injury to the Works

Clause 6.3.1: There are three alternative regimes for insuring the risk of damage to the Works in the joint names of the parties (see clauses 6.3.2 and 6.3.3), and with a waiver of subrogation rights against named sub-contractors (see clause 6.3.3) the insurance being required until Practical Completion (see clauses 6.3A.1, 6.3B.1, 6.3C.1 and 6.3C.2, see also clause 2.11, where partial possession occurs.).

- Clause 6.3A: Erection of new buildings, All Risks (see clause 6.3.2) insured by the Contractor. The Contractor bears the excess and has the risk of any insurance money shortfall (see clause 6.3A.4.5).
- Clause 6.3B: Erection of new buildings, All Risks (see clause 6.3.2) insured by the Employer. The Employer bears the excess and has the risk of insurance money shortfall (see clause 6.3B.3.5).
- Clause 6.3C: Existing structures (Specified Perils, see clauses 8.3 and 6.3C.1) and Works in or extensions to existing structures (All Risks, see clause 6.3.2) insured by the Employer. The Employer is entitled to determine the Contractor's employment if an insured risk occurs causing loss or damage affecting the work executed (see clause 6.3C.4.4). The Employer bears the excess and has the risk of any insurance money shortfall (see clause 6.3C.4.5). In practice, such joint names insurance may be difficult to obtain.

Employer's loss of liquidated damages

Clause 6.3D: The Contractor's obligation (optional) to insure the Employer for loss of his entitlement to liquidated damages in the event of the Contractor being entitled to an extension of time due to loss or damage to the Works, etc. caused by the Specified Perils (see clauses 8.3 and 2.4.3).

Joint Fire Code

Clause 6.3FC: Optional procedures where the Joint Code of Practice on the Protection from Fire of Construction Sites and Buildings Undergoing Renovation applies. This is a Code of Practice promulgated by insurers to minimise such risks. If applicable, both Employer and Contractor are required to comply with the Code.

SECTION F: DISPUTE RESOLUTION

Article 8: The Adjudication agreement.

Article 9A: The Arbitration agreement.

Article 9B: Litigation option.

Clause 9A: Adjudication procedures, enforcement and effect on the parties (note clause 4.7, and special procedures where dispute concerns opening up of work, clause under 8.4.4, see clause 9A5.8). See also the Adjudication Agreement (published separately).

Clause 9B: Arbitration, procedures and powers (note clause 4.7).

Clause 9C: Legal proceedings (see separately published note on choice between arbitration and litigation).
