



Contract Administration: What Documentation and When? Getting it right under JCT 2016

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A bit about us

□ Marcus Harling

Marcus is a Partner in the Construction and Engineering Team with over 30 years' experience.

Marcus specialises in strategic construction and development procurement issues combining in depth knowledge of procurement, construction and development with front end of project strategy.

□ Tim Kittow

Tim is an Associate in the Construction and Engineering Team and has significant experience of both contentious and non-contentious matters across a broad range of construction projects.

Earlier in his career, Tim spent 4 years working in-house for multi-national engineering consultancy Hyder Consulting (now Arcadis).

Employer's Agent / Contract Administrator



- What does the role involve?
- How are the risks managed?
- What does the market expect?
- Threat or opportunity?



Employer's Agent / Contract Administrator



Employer's Agent

Specific to Design and Build Contract

Contract Administrator

Generic term

May also be "Certifier" "Engineer" "Surveyor" "Architect"
or "Project Manager"

Employer's Agent / Contract Administrator Scope



- Appointment Document
- Scope of Service
- Requirements of Construction contract



Employer's Agent



Article 3 JCT 2016

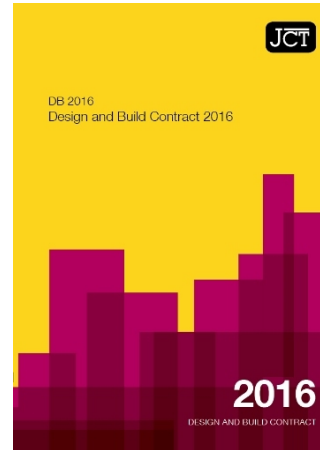
"...the Employer's Agent shall have full authority to receive and issue applications, consents, instructions, notices, requests or statements and otherwise to act for the Employer under any of the Conditions"



Employer's Agent



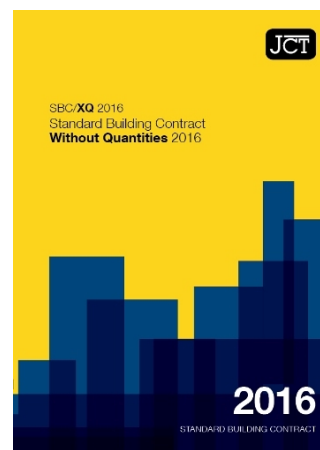
- Interim and Final Payments (4.9)
- Pay Less Notices and other general provisions (4.10)
- Instructions (3.5)
- Practical Completion Statement (2.27)
- Notice of Completion of Making Good (2.36)



Contract Administrator



- Interim Certificates (4.9)
- Final Certificate (4.26)
- Instructions (3.10)
- Practical Completion Certificate (2.30)
- Certificate of Making Good (2.39)



Changes under JCT 2016 suite



- Various amendments; key ones from Contract Administrator's perspective:**
 - Interim Valuation Dates ("IVD")
 - First IVD set out in contract particulars- if not, will be one month after works commencement and then at monthly intervals
 - N.B. if IVD falls on a weekend / bank holiday – will instead be nearest Business Day
 - Due date 7 days after IVD (other than under D&B where application is late)
 - Designed to allow payment to flow to all tiers of supply chain within 31 days of the IVD

Changes under JCT 2016 suite



- Loss and expense**
 - Intended to improve timing and certainty
 - Contractor must notify as soon as the likely effect becomes apparent to him (or should have become)
 - Supporting information should be supplied with the notice or as soon as reasonably practicable thereafter (as opposed to on request)
 - Monthly updates until "*all information reasonably necessary to allow ascertainment of the total amount of such loss and expense has been supplied.*"
 - Contract Administrator / Architect / Employer must assess the initial claim (i) within 28 days of receipt; and (ii) within 14 days of any update
 - Condition precedent (clause 4.19.1 (D&B) and 4.20.1 (SBC))?

Employer's Agent / Contract Administrator Duty to act impartially?



Contract Administrator

"In undertaking these (contract administration) functions, the Architect does not act as the agent of the Employer but, he has a contractual obligation to act fairly, impartially and in accordance with the powers given to him by the conditions. The Employer is in breach of the contract with the Contractor to the extent that he does not intervene to arrange for the correct or a correcting step to be taken by the Architect".

BR and EP Cantrell v Wright and Fuller [2003] BLR 412

Contract Administrator

"The employer and the contractor make their contract on the understanding that in all matters where the architect has to apply his professional skill he will act in a fair and unbiased manner in applying the terms of the contract".

Sutcliffe v Thackrah [1974] AC 727

Employer's Agent / Contract Administrator Duty to act impartially?



Contract Administrator

Duty to act impartially only arises when the appointed third party is administering the terms of the contract or acting in its 'decision making function' not its 'agency function', when its role is to advise the employer in its best interests.

Scheldebouw BV v St. James Homes (Grosvenor Dock) Ltd [2006] BLR 113



NEC3 / NEC4: Role of Project Manager



□ NEC4 Project Manager

“The *Employer*, the *Contractor* and the *Project Manager* act in the spirit of mutual trust and co-operation and so as not to prevent compliance by any of them with the obligations each is to perform under the Contract”.

Project Manager has a duty of impartiality...

- Assessing the amount due
- Assessing compensation events
- Issuing the Termination Certificate

Costain v Bechtel Ltd [2005]



Employer's Agent / Contract Administrator Duty to act impartially?



□ Employer's Agent

Unlike an Architect under a JCT contract, or an Engineer operating under an ICE contract, there is no obligation upon the Employer's Agent to make decisions as required by the contract in an impartial manner.

□ Employer's Agent

If appointed as the Agent of the Employer.

Check:

- Scope of service
- Limits on authority

From the Contractor's perspective, the act of the Employer's Agent is that of the Employer.

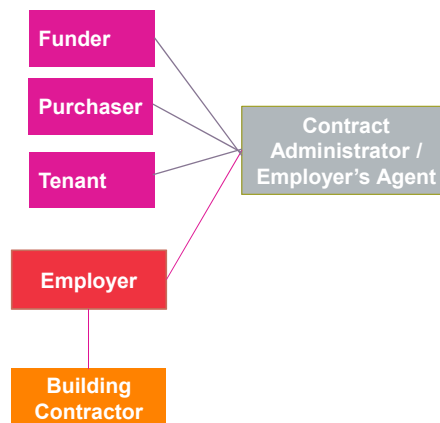
Employer's Agent / Contract Administrator What are the risks?



- Liability to Client
- Liability to others
- Significant impact



Risks and Obligations



Perception of risk



Risks

- Interim Payment
- Practical Completion
- Making Good Defects
- Latent Defects
- Collateral Warranties
- Third Party rights

How are risks managed

- Not final
- Avoid ambiguity
- Clear mechanism
- No primary liability
- To whom and on what terms

Practical completion



- What is practical completion?**
 - Not defined in the standard JCT suite
 - Works are generally considered to be practically complete when there are no outstanding defects (except for minor items or snagging) and the building can be put to its intended use
- Often defined in schedule of amendments**
- Check all requirements have been met**
- Shouldn't be issued if outstanding works**

Practical completion



Example definition:

“a stage of completeness of the Works which allows the property to be occupied and used and where:

(a) there are no apparent deficiencies or defects or incomplete items of work which would or could:

(i) compromise the health and safety of persons entering and/or occupying the property;

(ii) and/or

(b) all collateral warranties required to be entered into and/or provided by the Contractor in accordance with this Contract have been entered into and/or provided; and

(c) any other stipulations or requirements which the Contract Documents indicate are to be complied with.....”

Practical completion



Effects

- Liquidated Damages
- Risk / insurance
- Rectification Period commences

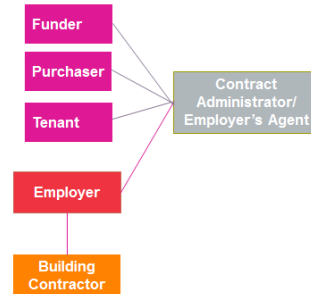


Employer's Agent / Contract Administrator

What the market expects



- Agreement for Lease – trigger for Lease
- Funder – relationship with Monitoring Surveyor
- “Independent” “Certification”
- A changing role



Payment Notices



- Payment notice
- Pay less notice
- Consequences – strict timescales
- Risks
 - Illness / absence
 - Holidays
 - Busy workloads
 - Lack of clarity around dates
- What if contract is not Construction Act compliant?

Case study



- ❑ Switched On Construction Ltd (“**Switched-On**”) is engaged by Cashcow PLC (“**Cashcow**”) under a JCT design and Build 2011 contract to construct its new state of the art HQ office building.
- ❑ Under the contract Switched-On is entitled to monthly payments and submits its November 2017 application for payment on 30 November as provided for in the contract claiming £750,000.
- ❑ Cashcow’s Employer’s Agent 007 receives the application and sends it to the project QS for comment. 007 is busy on a number of projects with everyone wanting things progressed before the Christmas shut down, and forgets to chase up the application before hitting the slopes with Miss Money Penny over Christmas.

Case Study continued



- ❑ The final date for payment of the application was 30 December, with the final date for issuing a pay less notice falling 5 days before that (i.e. 25 December).
- ❑ 007 returns from his Christmas break to an email from the QS setting out his assessment of the application which concludes that only £500k is due to Switched-On. 007 immediately then issues a pay less notice to Switched-On stating that Cashcow intends to pay £500k against the application- this notice was issued on 2 January.
- ❑ Cashcow makes payment of the £500k and Switched-On issues adjudication proceedings against Cashcow seeking to recover the additional £250k.
- ❑ How much is Switched-On entitled to be paid?

Employer's Agent / Contract Administrator Threat or Opportunity?



- EA / CA role is not a low risk admin role
- Resource accordingly
- Be very clear how the interface with other members of the team is to work and make sure the Client is aware what is needed
- Form an independent judgement at each stage
- Act in a timely way
- Take all factors into account
- Don't cut corners
- Know the scope and stick to it. EA / CA differences
- Resist an over demanding client
- EA with a duty to act independently in accordance with the Agreement for Lease is the same as CA
- Understand the high risk points and manage accordingly
- Advanced contract training essential
- Real understanding of the construction and real estate process vital



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