


JCT 2016 in Review



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Agenda

- The extent of the changes
- Payment
 - Amendments to the Forms
 - Problems arising from the Construction Act
 - Retentions
- Loss and Expense
- BIM
- Insurance
- Security Documentation
- Collateral Warranties and Third Party Rights
- Termination

What is the Extent of the Changes?

- Updates for CDM, Public Contracts Regulations, BIM and Public Sector Supplement
 - Evolutionary changes in some areas
 - Drafting improvements and rationalisation
 - For example,
'the amount stated in any Acceleration Quotation for which there is a Confirmed Acceptance' (JCT DB 2011)
becomes
'any amount agreed by Confirmed Acceptance of an Acceleration Quotation' (JCT DB 2016)
 - The pace of change is increasing
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What is the Extent of the Changes?

'It is not believed that any of the 2016 edition amendments or changes in format will in practice materially affect risk allocation'

(JCT Design and Build Guide 2016)

Payment – The Revised Provisions

- DBC 4.12 and 4.13; SBC 4.8 to 4.10; ICD 4.8 – 4.11; MW 4.3.
- Interim Valuation Date: first to be stated in Contract Particulars and then monthly
- Applications to be made no later than IVD [Required in DBC; optional in SBC]
- Due Dates: 7 days after Interim Valuation Date 7 or [DBC only] 7days after receipt of application, if later
- Monthly payment cycle after PC

Pay Less Notices

DBC 4.9.5 and 4.10; SBC 4.11.5 and 4.12;
ICD 4.12.5 and 4.13; MW 4.5.4

- Provisions rationalised and applied expressly to final payments

Note: The payment/pay less notice regime applies to payments following termination

Retentions – further change on the way?

A
BILL
TO

Make provision about protecting retention deposits in connection with construction contracts; and for connected purposes.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1 Retention deposit schemes

(1) The Housing Grants, Construction and Regeneration Act 1996 is amended as follows.

(2) After section 111, insert:—

“111A Retention deposit schemes

(1) The appropriate national authority must by regulations made by statutory instrument make arrangements for securing that one or more retention deposit scheme is available for the purpose of safeguarding any cash retention withheld in connection with construction contracts...

The JCT Payment Provisions and the Construction Act

The law of unintended consequences

‘Smash and Grab’ Adjudication

Grove Developments v S&T [2018] EWHC 123 (TCC)

- Adjudicator has the same wide powers as the court to open up, review and revise certificates, notices and applications
- The dispute as to the true value is not the same as a dispute arising from failure to give a notice
- The JCT contract distinguishes between the sum due and the sum stated to be due in a notice
- No justification in the Act for treating interim and final payments differently

Grove Developments v S&T [2018] EWHC 123 (TCC)

- Decided:
 - payer must pay sum awarded in adjudication following failure to serve a valid notice, but
 - payer can then refer question of the proper value to a further adjudication

Note: it is understood an appeal is pending

Schedules of Payment Dates

Grove Developments Limited v Balfour Beatty Regional Construction Limited

A cautionary tale about:

- Failing to agree important matters before contracting
- Finite schedules of payment dates

Loss and Expense

4.19.1 If in the execution of this Contract the Contractor incurs or is likely to incur any direct loss and/or expense as a result of any deferment of giving possession of the site or part of it under clause 2.4 or because regular progress of the works or any part of them has been or is likely to be materially affected by any Relevant Matter, he shall, subject to clause 4.19.2 and compliance with the provisions of clause 4.20 be entitled to reimbursement of that loss and/or expense.

Loss and Expense

4.19.2 No such entitlement arises where these Conditions provide that there shall be no addition to the Contract Sum or otherwise exclude the operation of this clause 4.19 or to the extent that the Contractor is reimbursed for such loss and/or expense under another provision of these Conditions.

Loss and Expense

4.20.1 The Contractor shall notify the Employer as soon as the likely effect of a Relevant Matter on regular progress or the likely nature and extent of any loss and/or expense arising from deferment of possession becomes (or should have become) reasonably apparent to him.

Loss and Expense

4.20.2 That notification shall be accompanied or, as soon as reasonably practicable, followed by the Contractor's initial assessment of the loss and/or expense incurred and any further amounts likely to be incurred, together with such information as is reasonably necessary to enable the Employer to ascertain the loss and/or expense.

Loss and Expense

4.20.3 The Contractor shall thereafter, in such form and manner as the Employer may reasonably require, update that assessment and information at monthly intervals under all information reasonably necessary to allow ascertainment of the total amount of such loss and expense has been supplied.

Loss and Expense

- 4.20.4 Within 28 days of receipt of the initial assessment and information and 14 days of each subsequent update of them the Employer shall notify the Contactor of the ascertained amount of the loss and/or expense incurred, each ascertainment being made by reference to the information supplied by the Contractor and in sufficient detail to enable the Contractor to identify differences between it and the Contractor's assessment.

BIM

- Provision for BIM Protocol (new definition and entry in contract particulars)
- Parties to supply the protocol
- Design Submission procedure now defined by reference to BIM Protocol with Schedule 1 applying where none
- BIM Protocol is a Contract Document (see definition) but does not override or modify Agreement or Conditions (DBC clause 1.3)

Insurance

- JCT recognises difficulty faced by occupiers of existing structures insured by others – typically tenants whose landlords effect insurance
- Tenants may not be able to effect joint insurance of existing structures under C1
- Contract now provides for bespoke arrangements to be set out in a C1 Replacement Schedule 30

Insurance

- What alternatives might be provided for?
 - In lower value jobs the contractor PL cover may respond but check policy carefully for exclusions
 - Higher value may need more complex arrangements with different layers of cover
 - Where existing structure is a shell or façade, it may be possible to use extended Option A cover
 - **Take advice from insurance specialists**

Security Documentation

- Contracts now contain provisions requiring a performance bond or guarantee and/or a parent company guarantee
- Contract Particulars to indicate whether required, and relevant form and details
- No JCT standards are provided
- No enforcement provisions

Collateral Warranties and Third Party Rights

- Unsatisfactory Contract Particulars, Part 2 has gone
- 'Rights Particulars' now to be set out in separate document identified in Contract Particulars
- JCT provide model forms for Rights Particulars
- Rights may be TPR [not in IBC] or warranties
- Default warranties are JCT forms

JCT Collateral Warranties

- Warranty Particulars truncated in favour of cross-reference to main principal contract
- Net contribution clause
 - No longer optional
 - Reference to contractor/subcontractor deleted

Other Changes

- Updated for CDM Regulations 2015
- Design submission procedure under ICD now aligned with those in DB and SBC
- Incorporation of Public Sector Supplement
- Supplemental Condition 11 provides for compliance with Freedom of Information Act 2000
- Supplemental Condition 12 requires subcontracts to comply with certain provisions in Public Contracts Regulations (where applicable)

Other Changes

- Clause 8.6 and 8.11 provide for termination in circumstances where Reg 73(1) of Public Contracts Regulations require it to so provide
- MW form aligned with others by permitting instruction not to make good defects and to make an '*appropriate deduction*' instead
 - But what is an appropriate deduction?