

Guidance Notes

Use of Minor Works Building Contract

- 1 The Contract should only be used where the employer has engaged an architect or other professionally qualified person to advise on and administer its terms.
- 2 The criteria for determining the suitability of the Contract are set out on the inside of the front cover.
- 3 For Works which do not fulfil these criteria, reference should be made to www.jctcontracts.com for guidance as to the appropriate contract.
- 4 The Contract is predicated upon a lump sum offer being obtained, based on drawings and/or a specification and/or work schedules, but without detailed measurements. Those documents should therefore be in a form sufficient to enable the Contractor accurately to identify the work to be done without the need for the Employer to provide bills of quantities.
- 5 The Contract is not suitable for use where the Works are of a complex nature or where the period required for the execution of the Works is such that full labour and materials fluctuation provisions are needed.
- 6 Amendments have been made in the 2011 edition of the Contract to its payment provisions with a view to ensuring that it continues to comply with the requirements of the Housing Grants, Construction and Regeneration Act 1996 ('the Construction Act'), as now amended by the Local Democracy, Economic Development and Construction Act 2009 ('the 2009 amendments'). In addition to the revised statutory requirements regarding payment procedures, the Construction Act continues to provide a statutory right for either Party to refer disputes or differences to adjudication.
- 7 However, not all building contracts are subject to the Construction Act; for example, a contract with a residential occupier within the meaning of section 106 of the Act is excluded and therefore it does not need to contain adjudication provisions, but, unless amendments are made, a residential occupier in entering into a Minor Works Building Contract will be accepting adjudication as a means of resolving disputes.
- 8 For some projects where it is intended to use the Contract, the Employer may wish to control the selection of sub-contractors for specialist work. This may be done by naming a person or company in the tender documents or in instructions on the expenditure of a Provisional Sum. There are, however, no provisions in the Contract to deal with the consequences of such naming and control of specialist work may be better achieved by the Employer entering into a direct contract with his chosen specialist.
- 9 Clauses 3-9 and 3-10 of the Contract make provision in relation to CDM Regulations and their implications are referred to at paragraph 23 and 24 below. As the Contract is intended for use on smaller projects, however, no reference has been made in the Contract itself to the requirements of the Site Waste Management Plans Regulations 2008 (SI No. 314), since the latter apply only to projects with an estimated cost greater than £300,000. Where the estimated project cost is more than this amount, the Employer is required to prepare a site waste management plan and to appoint a principal contractor to maintain it. Article 6 in the JCT Standard Building Contract expressly covers that appointment, but it can of course be dealt with outside the Contract form.

Outline of the Contract

Architect/Contract Administrator

- 10 This is the professional whom the Employer has appointed to advise on and administer the Contract. If the appointee is not an architect, he is taken to be referred to in the Contract as the 'Contract Administrator', but, irrespective of the Architect/Contract Administrator's profession, their duties under the Contract are the same.

Role of the Architect/Contract Administrator

- 11 The Architect/Contract Administrator is paid by the Employer, advises the Employer on all matters in

connection with the building work and administers the Contract on behalf of the Employer with a view to securing completion of the work in an efficient and economical manner. However, in relation to decisions in that administrative role that require professional skill and judgment, he should act fairly and independently as between the Employer and the Contractor, in particular when:

- issuing payment certificates;
- valuing any variations or any work instructed in respect of Provisional Sums (see “Terms used”) included in the Contract Documents;
- giving any extension to the time stated in the Contract Particulars for the completion of the building work;
- certifying the date of practical completion (see “Terms used”) and the date when in his opinion all defects which appear during the Rectification Period (see “Terms used”) have been made good.

Instructions

- 12 Under the Contract only the Architect/Contract Administrator can issue instructions to the Contractor; although the Employer is paying for the building work, he is not entitled to give any instructions direct to the Contractor in connection with it. If the Employer wishes to make any change to the work or the manner in which it is being carried out, he must ask the Architect/Contract Administrator to give the necessary instructions to the Contractor.

Price

- 13 This is the lump sum stated in the Contract, plus any VAT properly chargeable on the building work. The precise sum may be increased or decreased depending on any changes to the work or the order or period in which it is carried out, the value of work instructed by the Architect/Contract Administrator in respect of any Provisional Sums included in the Contract Documents and, where applicable, any increase or decrease in contributions, levies and taxes for which the Contractor is liable.

Time-scale for the work

- 14 If it becomes apparent that the work cannot be finished within the original time stated in the Contract Particulars the Contractor is required to notify the Architect/Contract Administrator straightaway. If the delay arises for reasons beyond the control of the Contractor, the Architect/Contract Administrator is then required to give such extension of time as is reasonable.

If the work is not finished by the Date for Completion (see “Terms used”) after taking into account any extensions of time, the Employer can recover liquidated damages (see “Terms used”) from the Contractor.

Payment

- 15 Payment is made under certificates issued by the Architect/Contract Administrator which until practical completion are to be issued every 4 weeks, calculated from the date of commencement. A further certificate is to be issued within 14 days of practical completion. Interim certificates are thereafter issued at intervals of 2 months (unless otherwise agreed) up to the expiry of the Rectification Period. The final balance is paid following the issue of the final certificate. The final date for payment of certificates, together with any VAT chargeable to the Employer, is 14 days from the due date for payment.

Unless a percentage for payment other than 95 per cent is inserted in the Contract Particulars for clause 4.3 interim certificates for the period up to practical completion will reflect the Employer’s entitlement to retain 5 per cent. For the period between practical completion and the final certificate, the Contract envisages that the percentage retained will be halved.

The 2009 amendments to the Construction Act require interim and final certificates to be issued not later than 5 days after their due date. Therefore, unless otherwise agreed by the Parties at the time, a late certificate will be ineffectual and, to restart the payment procedure in those circumstances, the Contractor may need to give a payment notice, stating the amount that he considers due to him.

If the Employer fails to pay an amount due to the Contractor by the final date for its payment, interest at a rate of 5% per annum over the official dealing rate of the Bank of England is payable by the Employer for the period until payment is made.

It is clear from the 2009 amendments that if in response to a certificate or payment notice the Employer gives a 'pay less' notice and pays the lesser amount that he specifies in the 'pay less' notice, the Contractor's right under the Construction Act to suspend for non-payment does not arise. However, the JCT provision for interest is intended to preserve the Contractor's right to interest on the additional amount that he should have been paid, insofar as there was no sustainable basis for a withholding by the Employer and regardless of any 'pay less' notice that the latter has given.

Suspension

- 16 If the Employer does not give a 'pay less' notice and does not pay the amount due to the Contractor by the final date for its payment, or, having given a 'pay less' notice, then fails to pay the amount specified in it, the Contractor, after giving notice, has the right to suspend performance of some or all of his obligations under the Contract until payment of the appropriate amount is made. Under the 2009 amendments there is also now a statutory right for him to recover reasonable costs and expenses that he incurs as a result of exercising that right.

Termination

- 17 Either Party may end the Contractor's employment if the other Party does not comply with certain stated obligations or becomes insolvent.

Dealing with disputes

- 18 Either Party may at any time refer any dispute to adjudication for a 'fast track' decision; the adjudicator's decision is binding unless and until the dispute is decided by an arbitrator or the court. Residential occupiers wishing to use the Contract should also refer to paragraph 7 above. The Contract Particulars enable the Parties to nominate an individual adjudicator in advance, should they wish. However, an individual should not be named in the Contract without his prior agreement. It has also to be recognised that those of sufficient standing to merit nomination are generally busy people and that when a dispute arises they may not be available.

The Parties may also agree to mediate a dispute.

For final dispute resolution in cases where either or both Parties are dissatisfied with the results of adjudication or mediation (or neither Party wished to have the dispute adjudicated), the choice is between court litigation and arbitration. Since 2005 litigation has been the default option under JCT contracts. If arbitration is the agreed choice, it should be selected through the appropriate entry in the Contract Particulars.

The JCT 2011 edition of the Construction Industry Model Arbitration Rules (CIMAR), which includes the JCT Supplementary and Advisory Procedures, will govern any arbitration that is commenced. It is recommended that anyone considering instituting arbitration proceedings should obtain a copy of the rules and, as with litigation, should take competent professional advice before taking steps to institute proceedings.

In making the choice between arbitration and litigation, in addition to the adjudication option, one should consider a range of other factors. Arbitration provides the ability to choose an arbitrator from any relevant profession, greater freedom of choice procedurally and confidentiality, whereas in litigation there is the wider power of the court. In the case of contracts where claims either way are likely to be small, it may be considered desirable to keep open the potentially cheaper route of using the County Court small claims track; any agreement to arbitrate, unless suitably qualified, would normally operate as a bar to using that route if the other Party did not agree.

Rights and remedies generally

- 19 Statutory and common law rights are not restricted by the terms of the Contract. The limitation period for a contract that is simply signed by the Parties is 6 years from the date of the breach or, where it is executed as a deed, 12 years. The limitation period should not be confused with the Rectification Period, which is provided to facilitate the remedying of the Contractor's defective work by allowing him to return to site to make good.

Supplemental Provisions

- 20 Schedule 3 comprises six optional Supplemental Provisions which build upon the traditional JCT approach and reflect principles adopted by the Office of Government Commerce in the Achieving Excellence in Construction initiatives. They are for use where appropriate; the extent of such use may depend upon factors such as the scope of the project, the participants and the type of relationship that the Parties wish to have. The choice as to which provisions apply is made in the Contract Particulars. If no choice is made in relation to a provision, it will apply, since the provisions

are generally intended to be disapplied only where there is a Framework Agreement or other contract documentation that covers the same ground.

Terms used

- 21 As part of his duties to the Employer, the Architect/Contract Administrator should be prepared to explain the general meanings of the various terms used in the Contract. For example:

Base Date

- 22 The Base Date is stated in the Contract Particulars. The date often selected is 7 days or thereabouts before the date for submission of tenders so as to avoid any need for tenderers to deal with last minute changes. In the Minor Works Building Contract, however, Base Date plays a comparatively minor role, acting as the date of record for the Employer's status under the CIS scheme and for determining what fluctuations are payable.

CDM Regulations

- 23 Regulations made under Act of Parliament to improve health and safety standards on construction sites. The extent to which the CDM Regulations 2007 apply depends on whether or not the project that comprises or includes the Works is notifiable under the CDM Regulations. Part 2 of the CDM Regulations imposes duties (e.g. as to competence, co-operation, co-ordination and preventive steps) on clients, designers, contractors and sub-contractors at each level, whether or not the project is notifiable, as does Part 4 in relation to contractors, sub-contractors and others controlling work during the construction period. The additional duties contained in Part 3 (including those relating to the CDM Co-ordinator and Principal Contractor) apply only where the project is notifiable. Projects are generally notifiable if they involve 30 days or 500 person days of construction work. However, domestic clients (i.e. clients not acting in the course or furtherance of business) are not subject to duties under the CDM Regulations in relation to purely domestic projects, which in turn are treated as non-notifiable.

CDM Co-ordinator

- 24 The person named as the CDM Co-ordinator in the Articles of Agreement or subsequently appointed as such as required by the CDM Regulations. A CDM Co-ordinator is required only where the project is notifiable under the CDM Regulations.

Date for Completion

- 25 The date by which the Contractor is required to finish the work, as stated in the Contract Particulars or subsequently extended by the Architect/Contract Administrator.

Date of practical completion

- 26 The date when, in the Architect/Contract Administrator's opinion, the Contractor has to all practical intents and purposes completed the Works.

Rectification Period

- 27 Unless otherwise agreed, the Rectification Period is 3 months from the date of practical completion. The Contractor is required to put right any defects in the work which appear during the Rectification Period before he is entitled to be paid the final balance of the Contract price. The Architect/Contract Administrator is required to notify the Contractor of any such defects not later than 14 days after the expiry of the Rectification Period.

Health and safety file

- 28 A manual which the CDM Co-ordinator is responsible for delivering to the Employer on completion of the work, giving information for the future on the management of health and safety in the maintenance, repair, renovation, occupancy or demolition of the work and its contents. It is only required where the project is notifiable under the CDM Regulations and is not required where the client is a residential occupier undertaking a purely domestic project.

Insurance in Joint Names

- 29 A policy of insurance under which both Parties are covered if an insured risk occurs. There is normally no substantial difficulty in obtaining Joint Names insurance for the Works but, in cases that

involve residential occupiers, it is difficult to obtain Joint Names insurance for existing structures and contents. Where such Joint Names insurance is unavailable, the alternative of taking out insurance in the Employer's sole name (clause 5.4C) should be selected. Where such insurance is already provided under an existing household policy, the Employer's household insurer must nevertheless be notified that building works are to be carried out; the insurer may require the Employer to pay an additional premium. Where clause 5.4C is to apply, clause 5.4A, requiring the Contractor to insure the Works in Joint Names, should also remain operative.

Each Party should obtain advice from his own insurance adviser about coverage of the risks stated in the Contract. This should be done and the position agreed before the Contract is signed.

Any excesses under a policy are normally borne by the Party required to take out the insurance. In the case of the Works insurance, care should also be taken in determining the full reinstatement value (including any applicable VAT) and to ensure that the policy gives appropriate cover for items such as the additional costs of materials, working and removal of debris etc. that are likely to arise from loss or damage to the Works.

Liquidated damages

- 30 The rate per day/week/month stated in the Contract Particulars by the Employer, to compensate him for the Contractor's failure to finish the work on time. The rate should be a genuine pre-estimate by the Employer of the financial loss that he is likely to suffer. It is for the Employer to decide whether to deduct any liquidated damages that he might be entitled to from any amount certified as due to the Contractor; such deduction is not taken into account by the Architect/Contract Administrator in the calculation of any certificate and the appropriate notice must be given by the Employer under clause 4.5.4, 4.8.3 or 4.8.4.3.

Provisional Sum

- 31 A sum included for work which the Employer may or may not decide to have carried out, or which cannot be accurately specified in the original contract documents. For instance, where the Employer is undecided whether all, some or none of the outside of the premises will need to be re-decorated, the pricing documents may say "Allow £X for complete external redecoration of the premises." If the Employer then decides any redecoration is necessary, the specification required is instructed by the Architect/Contract Administrator and the price to be paid is either agreed between the Architect/Contract Administrator and the Contractor or valued by the Architect/Contract Administrator.

Variation

- 32 A change to the work that the Architect/Contract Administrator instructs on behalf of the Employer. The variation may be an addition to or an omission from the work as originally specified or to the order or period in which it is to be carried out.

2011 changes

The following provisions in 2011 Edition contain textual changes. The provisions with substantive textual changes have been identified with *.

2011 numbering

Articles

Article 4
Article 5
Article 7

Contract Particulars (entries)

7.2

Conditions (clauses)

1.3.5
1.6*
2.5.1
2.7*
2.8.2, 2.8.3
2.10*
2.11

3·1
3·3·1, 3·3·2·3
3·4
3·5
3·10
4·3*
4·4*
4·5*
4·6
4·7*
4·8*
4·9
4·10
6·1*
6·2·3
6·5·2·1
6·6
6·7·2*, 6·7·3 introduction
6·8·1·1
6·10·1 hanging paragraph
6·11·1

Schedules

Schedule 1	paragraph 1 paragraph 2·1
Schedule 2	paragraph 4·1 paragraph 8 paragraphs 10·1 and 10·2·2
Schedule 3	paragraph 4·1

MW User Checklist

A checklist of the key information that will help you to complete the Articles of Agreement may be downloaded from the JCT website.

Care has been taken in preparing these Guidance Notes but they should not be treated as a definitive legal interpretation or commentary. Users are reminded that the effect in law of the provisions of the Minor Works Building Contract 2011 Edition is, in the event of a dispute as to that effect, a matter for decision in adjudication, arbitration or litigation.