



# JCT Contracts 2016 and all that

by Andrew James  
Partner, Head of Construction and Engineering

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# Main Contracts published so far:

- Minor Works (June)
- Design and Build (September)
- Standard Building Contract (October)
- Intermediate Form of Contract (December)

The rest due for publication in 2017

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# Design and Build Form

- JCT says changes do not “materially affect risk allocation”
- No provision for Contractors to take full responsibility for design in Employer’s Requirements
- No provision for an overall cap on liability for the Contractor

# Basic Changes

- Incorporates CDM 2015 – and note that default provision is the Contractor is the Principal Designer
- Site Manager rather than “person in charge”
- Public Contracts provisions included in the previous Public Sector Supplement 2011 relating to fair payment, transparency (e.g. Freedom of Information Requests) and BIM now in the contract rather than a separate supplement

## Basic Changes cont...

- Includes new termination grounds to reflect Regulation 73 of the Public Contract Regulations 2015 under which a public contracting authority has the right to terminate the contract (e.g. breach of procurement regulations)
- An option to replace works insurance Option C to allow for alternative solutions to the problems for tenant employers and domestic homeowners of obtaining existing structures cover for Contractors
- Option to include a BIM Protocol as a Contract Document – but provisions very brief and not really adequate

# Other Changes

- Option for provision of Performance Bond and/or Parent Company Guarantee – but note
  - no explicit sanction for not providing
  - PB and PCG only to be in “substantially” the form of the document(s) to be attached
  - no specified forms

# Collateral Warranties and Third Party Rights

- Part 2 of the Contract Particulars has gone and it is up to you to produce your own “Rights Particulars” document specifying who has to provide CWs or TPRs
- New option for TPRs from Sub-Contractors – could save paperwork
- JCT CWs and TPRs are still not funder friendly (e.g. contain net contribution clauses)
- No sanction for failing to provide CWs

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# New Payment Provisions

- Right to interim payments monthly, rather than bi-monthly, after PC
- More significantly, new Interim Valuation Date – date to be specified in Particulars and in default first IVD is one month after date of possession of the works and then at monthly intervals on the same day each month or the nearest Business Day in that month
- Intention that same IVD throughout the supply chain to promote fair payment

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# New Payment Provisions - Timing

- Contractor to make IPA stating sum due at due date and basis of calculation
- Due date = 7 days after relevant IVD (or if IPA received later 7 days after receipt of IPA)
- Payer's payment notice 5 days after due date (as per the Act)
- Final date for payment 14 days after the due date (both for interim and final account payment)

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## New Payment Provisions – Timing cont...

- Any pay less notice 5 days before final date
- Note that under the JCT Sub-Contract the due date is 12 days after the IVD ( or receipt of the IPA) and therefore payment to the Sub-Contractor is 5 days later if the JCT Sub-Contract is used. Note option to require Sub-Contractor to submit IPA 4 days before IVD (clause 4.6.2)

# New procedure for ascertaining loss and expense claims

- The Contractor is required to:-
  - notify the Employer of the likely effect on progress or the likely nature and extent of any loss and/or expense as soon as it becomes or should have become reasonably apparent;
  - provide at the same time, or as soon as reasonably practicable, its initial assessment of the loss and expense and any further amounts likely to be incurred, together with such information as is reasonably necessary to enable the Employer to ascertain this amount; and
  - provide monthly updates until all information that is reasonably necessary to allow the Employer to finally ascertain the total amount of the loss and expense incurred

## **New procedure for ascertaining loss and expense claims cont...**

- For its part the Employer is required to:-
  - notify the Contractor of the ascertained amount within 28 days of receipt of the initial assessment and information; and
  - within 14 days of each subsequent update of them
- Is the provision of the notification, initial assessment and monthly updates a condition precedent to entitlement?

## In other news ...

- Regulation 113 of the Public Contracts Regulations 2015
- Duty on contracting authorities to ensure that contracts contain a requirement to pay within 30 days
- They must also ensure that clauses to the same effect are contained in Sub-Contracts and Sub-Subcontracts
- If contract provides for longer than 30 day period, Regulations override this (at least at Main Contractor level)

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## In other news cont...

- Recent Cabinet Office guidance suggests that the 30 day period starts the day after the payment notice (by the payer) was or should have been issued or when a default notice was issued, whichever is later, to establish when an invoice was valid and undisputed
- Therefore, generally, final date for payment no greater than 35 days after due date
- Right to make complaint to Government's "mystery shopper scheme"

# Other Payment Issues

- Numerous cases emphasise the need for applications for payment to be clear and unambiguous and valuing work as at the due date – be wary of relying on “draft” accounts or “initial assessments”
- Be careful about amending payment provisions see e.g. *Grove Developments v Balfour Beatty*
- A pay less notice can value the works differently to the valuation given by the CA/EA – see *Henia v Beck Interiors*
- Final accounts are different – see the *Harding v Paice & Purton* cases

# Unresolved Issues

- How detailed does the basis of calculation have to be for there to be a valid payment notice?
- Can a late payment notice be construed as a valid pay less notice? (see now the *Logan Construction* case)
- Scope to argue that application invalid due to fraud (e.g. relevant work not carried out)?



## Unresolved Issues cont ...

- Can you counter adjudicate on a final account where you have failed to issue a payment notice or pay less notice in time so as to avoid the consequences of not issuing those notices?
- Can you recover legal costs for pursuing unpaid amounts under the Late Payment of Commercial Debts (Interest) Act and Regulations? See the *Lulu Construction* case



# Andrew James

**Partner**

**Head of Construction and Engineering**



[ajames@hcrlaw.com](mailto:ajames@hcrlaw.com)



07711 272782

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