November 2024

Contract Administrator

NBS Contract Administrator provides an efficient platform to administer JCT and SBCC contracts, and has been designed to be simple and intuitive to use. It contains electronic copies of the official RIBA contract administration forms for use with the JCT Standard, Intermediate, Minor Works, and Design and Build contracts.

The forms in NBS Contract Administrator are based on the contract administration forms published by RIBA; however, the JCT now publishes its own contract administration forms for both the 2016 and 2024 editions. We understand that RIBA does not currently plan to publish forms for the JCT 2024 contract editions.

The main difference between the RIBA and JCT contract administration forms is that JCT now provides up to six additional forms (depending on the form of contract), which are not available in the NBS Contract Administrator application, namely:

JCT contract administration form	Form of contract			
	MW/ MWD	IC/ ICD	SBC	DB
Valuation	X	X	X	X
Pay Less Notice	X	X	X	X
Notice of Intention to Require Payment of, Withhold or Deduct Liquidated Damages* (Notice of Intention to Deduct Liquidated Damages in MW/ MWD*)	X	X	X	X
Notice to Require Payment of, Withhold or Deduct Liquidated Damages*	N/A	X	X	X
Notice of Intention to issue Employer's Final Statement	N/A	N/A	N/A	X
Final Payment Notice	N/A	N/A	N/A	X

** These forms are to be completed by the employer and sent to the contractor and architect/ contract administrator. In the DB 24, they are to be completed by the employer or employer's agent, and sent to the contractor.*

Other than the above noted forms, the JCT contract administration forms are substantially the same as the RIBA forms currently available in NBS Contract Administrator.

Please be aware that some of the guidance provided with the software is no longer current in places. For example, in the SBC 24/ DB 24, extensions of time should now be assessed within eight weeks of receiving the notice and particulars, or prior to the completion date if this is less than eight weeks away (this was previously 12 weeks in the 2016 editions). Another example is that the list of 'Relevant Events' has now been extended in the SBC 24/ DB 24/ IC 24 to include epidemics and the exercise of statutory powers after the contract 'Base Date' (additionally, these may also be included as optional 'Relevant Matters' under the contract).

The publication of the JCT 2024 contract editions has necessitated the review of the guidance on the NBS Contract Administrator application. Amendments have been made to account for changes brought about by the 2024 editions, as well as general corrections to the guidance as required. The table below shows a summary of the form guidance that has required amendment:

Form	**SBC24**	**DB24**	**MW/ MWD24**	**IC/ ICD24**
Adjustment of Completion Date	Amended	Amended	No change	Amended
Architects Instruction	Amended	Amended	Amended	Amended
Interim Certificate	Amended	Amended	Amended	Amended
Statement of Retention	Amended	No change	N/A	N/A
Statement of Reimbursement	No change	No change	N/A	No change
Practical Completion Certificate	No change	Amended	No change	No change
Partial Possession by the Employer	No change	N/A	N/A	No change
Section Completion Certificate	No change	Amended	N/A	No change
Non-Completion Certificate	Amended	Amended	Amended	Amended
Certificate of Making Good	No change	No change	No change	Amended
Final Certificate	No change	No change	No change	No change

Details of the specific amendments for each of the affected forms are available below.

How to use this document

- New additions are shown as blue text.
- Updated text is highlighted (The previous version can be viewed in a pop-up by holding your cursor over the highlight).

Contents

JCT DB 2024 Design and Build Contract

Adjustment of Completion Date

As there is no independent contract administrator, it is important that the Employer operates the extension of time provisions fairly, and understands the reason for their inclusion. They are included;

- to preserve the Employer's right to liquidated damages in the event that the Contractor fails to complete on time;
- for extending the time for completion where the Employer has caused delays;
- for the occurrence of certain neutral events such as exceptionally adverse weather.

Notice of delay

The Contractor must notify the Employer when progress is being or is likely to be delayed, listing out the material circumstances and causes including identifying any relevant events. For each relevant event the expected effects, including an estimate of the likely consequence on the completion date, must be included with the notice or be issued as soon as possible. Prior to practical completion the notice appears to be a condition precedent for the granting of an extension of time and therefore, the Employer is not obliged to issue an extension until the Contractor has properly complied.

After receiving a notice of delay, its effect upon the completion date must be assessed. The Employer can request further information not later than 14 days from receipt of the Contractor's particulars or notification. Either the Employer must make a considered decision or the alternative procedure relating to a change instruction can apply. There is an obligation to respond to the Contractor's notice, even if no extension of time is granted. Failure to respond can affect the operation of fluctuation clauses and the right to liquidated damages. It is in everybody's interests that the revision be issued as soon as possible.

Assessment by Employer

On receiving the notice and particulars, the Employer must assess the delay caused and notify the Contractor within 8 weeks. If the completion date is less than 8 weeks away, the Employer must try to reach a decision prior to the completion date. A decision must be given, even if the events listed by the Contractor are not relevant events and the current completion date is confirmed.

After the first extension, the Employer may take into account the omission of work and fix an earlier completion date, but not earlier than the original completion date stated in the contract particulars. Details of each relevant event or the omission instruction that has been taken into account should be stated; refer to a clearly-identified attached sheet if there is insufficient room on the form.

Assessment using Schedule 2

If Schedule 2 Supplemental Provisions are stated to apply in the contract particulars, the adjustment of the completion date will be modified by the provisions of Schedule 2. The Contractor must submit an estimate to the Employer within 14 days of the instruction unless the Employer states that an estimate is not required, or the Contractor makes reasonable objection.

The estimate must include:

- the value of the change (with supporting calculations referring to the Contract Sum Analysis);
- the additional resources required to comply;
- a method statement for compliance;
- the length of any extensions of time required;
- any loss and/or expense required.

When the estimate is agreed it is binding. If agreement cannot be reached within 10 days of receipt the Employer can either instruct the change or withdraw the instruction.

Relevant events

The Employer must state the extension or reduction of time that has been attributed to each relevant event.

Relevant events:

- any exercise of the Contractor's right of suspension arising from non payment of amounts due by the Employer;

- employers instructions in relation to divergences and discrepancies in or between documents, except for any instructions relating to a discrepancy or divergence in or between the Contractor's Proposals and/or other Contractor's Design Documents;
- employers instructions in relation to postponement of any work; employers instructions in relation to opening up any work covered up for inspection unless the works or materials used are not in accordance with the contract;
- section or whole of site being deferred in transference from the Employer to the contractor
- as refers to 'any impediment, prevention or default, whether by act or omission, by the Employer' it is of very wide scope and could duplicate some of the other events therefore giving alternative grounds for a claim.
- work done in pursuance of statutory duties by statutory undertakers or local authorities. This also applies if the Contractor is directly engaged by the Employer;
- weather must be exceptional and adverse. The effect of the weather is assessed at the time the work is actually carried out, not when it should have been according to the Contractor's programme;
- specified perils can under certain circumstances include events caused by the Contractor's own negligence;
- very wide protection is afforded with respect to strikes, and not simply those affecting the Works but also those causing difficulties in preparation and transportation of goods and materials, or the preparation of the contractor's designed portion. Such strikes will not necessarily be confined to the UK and, given the extent of overseas imports, the effects could be considerable;
- government intervention through statutory powers after base date (including the passing of new or amended laws and the publication of industry guidance by the Construction Leadership Council or its successor) providing the Contractor has taken all practicable steps to prevent or avoid the delay;
- delay in receipt of planning (or other) necessary permissions or approvals of statutory bodies provided the contractor has taken all practicable steps to avoid the delay;
- force majeure refers to all circumstances independent of the will of man, and which it is not in his power to control, including Acts of God;
- terrorism or civil action / threat or the response from the relevant authorities in dealing with such event;
- items that are defined and are to be treated as a change;
- the discovery of antiquities, asbestos, contaminated material and unexploded ordnance (except to the extent that the presence of asbestos or contaminated material has been identified in the contract documents and/or any such material has been brought onto site by the contractor/ contractor's person);
- epidemics which limit the availability or use of labour or services required for the works, or that prevent or delay the contractor from securing the necessary goods or materials required for the works;
- there is no ground for claiming for delay caused by a sub-contractor or shortage of labour, goods or materials.

Review of extensions of time after Practical Completion

If the completion date has passed and practical completion has not been achieved, the Employer may make a final assessment and issue a final notification, and must do so not later than 12 weeks after the date of practical completion. This should take account of any relevant events, whether notified by the Contractor or not. If a relevant events occurs after the date for completion or any extended completion date, when the Contractor is in "culpable delay", the extension is added onto the date that has passed.

Instruction

Power to issue instructions

Only the Employer or the Employer's Agent has the power to issue instructions and they should be in writing, therefore use instruction form in preference to writing a letter, as it is clearly perceived as an instruction and recorded as such. As the Contractor can request the Employer to specify which provisions of the contract conditions empowers its issue, it would be prudent to state this in the instruction. Any issues with health and safety implications must be brought to the attention of the Principal Contractor and the Principal Designer. The Contractor must comply with every instruction that the Employer is empowered to issue, except if the Contractor makes a reasonable objection to the obligations or restrictions imposed by the employer.

Where the contract states that some instructions SHALL be issued, these are a contractual obligation and failure will constitute a breach of contract by the Employer, for example:

- Divergences between the employer's Requirements and the definition of site boundary.
- Inadequacy in the Employer's requirements.
- Discrepancies and divergences.
- Divergences from statutory requirements.
- Defects arising in rectification period.
- Expenditure of provisional sums.
- Discovery of antiquities, asbestos, contaminated material or unexploded ordnance.

The contract also states that instructions MAY be issued for:

- Consent to sub-contract.
- Instruction requiring change.
- Postponement of work.
- Opening up and testing.
- Work not in accordance with contract.
- Workmanship not in accordance with the contract.
- Contractor proposed changes.

Oral instructions

An oral instruction is of no immediate effect; it should be confirmed in writing by the Contractor or the Employer within seven days. If confirmed by the Contractor, the Employer can dissent in writing within seven days of receipt of confirmation. If the Contractor carries out work on the basis of a verbal instruction, the Employer can sanction it at anytime prior to the issue of the final statement but the work would be at the Contractor's risk.

Compliance with statute

The Contractor has a contractual duty, in addition to the statutory duty, to comply with all statutory requirements, except where the employer's requirements expressly state that they comply. Additional protection is thus afforded the Employer as failure to comply with statute would become a breach of contract.

If the Contractor or the Employer finds a divergence between the contractor's proposals or the employer's requirements and statutory requirements, then immediate notice must be given to the other. Although under no express obligation to search, if the Contractor fails to find a divergence and the resulting Works do not comply, they could be in breach of contract notwithstanding that the error lay in the employer's requirements. Upon discovery of any divergence, the Contractor must inform the Employer in writing of their proposed amendment and agreement of the Employer obtained. If the Employer cannot agree to the proposed amendment an instruction should be issued possibly changing the requirements.

Additional cost can be claimed where:

- the statutory requirement did not exist at the Base Date;
- it became necessary to conform with conditions attached to an approval obtained after the Base Date;
- the Employer's Requirements asserted that the item in question complied.

In an emergency, the Contractor may need to take sufficient immediate action to comply with statutory requirements before the consent of the Employer can be obtained. The Employer must be notified of the steps taken as soon as possible.

Health and safety

Where the Contractor is neither the Principal Designer nor the Principal Contractor the Employer has a contractual duty to ensure that others that are engaged must undertake these duties under the CDM Regulations. Breach gives the Contractor the right to terminate the contract or claim as a relevant event. If the Contractor is acting as the principal contractor, any breach of this duty is grounds for termination by the Employer.

Valuation

Changes and instructions relating to expenditure of provisional sums can be valued under the provisions of the contract either in accordance with the valuation rules (clauses 5.4 to 5.7) or, if the supplemental provisions are incorporated, through the submission of Contractor's estimates (Schedule 2 Supplemental Provision clause 4). In both cases the valuation should include a sum in respect of any additional design work necessitated by the instruction.

Schedule 2 quotations

If Schedule 2 Supplemental Provisions are stated to apply in the contract particulars, the valuing of instructions for changes, adjustment of completion date or loss and expense will be modified by the provisions within Schedule 2. The Contractor must submit an estimate to the Employer within 14 days of the instruction unless the Employer states that an estimate is not required, or the Contractor makes reasonable objection.

The estimate must include:

- the value of the change (with supporting calculations referring to the contract sum analysis);
- the additional resources required to comply;
- a method statement for compliance;
- the length of any extensions of time required;
- any loss and/or expense required.

When the estimate is agreed it is binding. If agreement cannot be reached within 10 days of receipt the Employer can either instruct the change, which could be valued under the valuation rules, or withdraw the instruction. In the latter case the Contractor will be paid for any design work carried out to submit the estimate.

Interim Payment Notice

Valuations and ascertainment

Payment provision detailed in the contract complies with the Local Democracy Economic Development and Construction Act and should not be amended without taking expert legal advice. As there is no independent certifier, the Contractor is required to make applications for interim payments, either at the completion of stages (Alternative A) or at regular intervals (Alternative B). The selected method is stated in the contract particulars. All applications should be accompanied by the information specified in the Employer's requirements.

Calculation of amount due

Ascertainment for Alternative A is detailed in and Alternative B in and summarized:

- Alternative A requires payment at completion of each stage identified in the contract particulars. The amount is the cumulative value at the relevant stage, plus the amount of any valuation of changes or of instructions relating to provisional sums, plus the value of listed off-site materials, goods or items, plus fluctuations that are applicable and due, plus any acceleration payment, plus direct loss and expense (and any other items not subject to retention).
- Alternative B requires valuations done on fixed dates each month set out in the contract particulars with design work valued at each application. Although there is no requirement that the value of the work is to be calculated using the rates shown in the Contractor's contract sum analysis, it would be open to the Employer to disagree with the application if it was made on some quite different basis. Payment includes total value of work properly executed, including any design work, plus total value of materials and goods properly stored on site, plus the value of listed off-site materials, goods or items, plus fluctuations that are applicable and due, plus direct loss and expense (and any other items not subject to retention).

Defects, non-compliance with instructions and amounts allowable under fluctuations options A or B are deducted from the payment for both methods of valuation.

Deductions

The contract expressly gives the Employer the right to make certain deductions from the sums applied for by the Contractor. Notice of the deductions must have been given, as stated in payment procedures.

Deductions authorised by the contract arise in respect of:

- retention, contract default 3%;
- total amount previously certified;
- non-compliance with Employer's instructions;
- defects appearing in the rectification period;

- advance payment;
- failure to carry out remedial measures in regards to beach of Joint Fire Code
- amounts allowable under fluctuations options;
- default in taking out or maintaining insurance premiums;
- amounts allowable by the Contractor under the terrorism cover provisions;
- payment or allowance of liquidated damages;
- operation of the Construction Industry Scheme (CIS).

Unfixed materials and goods

Where payment is ascertained using Alternative B, materials which have been delivered to the site but not yet incorporated in the Works should be included (clause 4.14.1.2). Under the Sale of Goods Act, a seller is entitled to retain ownership of goods until paid. The Contractor will therefore not be entitled for payment for products not incorporated into the Works, which are subject to reservation of title. Subcontracts and contracts for supply (including contracts for supply placed by subcontractors) should expressly provide that property in products shall pass unconditionally to the Contractor not later than their delivery to site.

The contract has the following detailed provision to protect the Employer:

- Unfixed materials and goods that have been delivered to the site and are intended for the Works may not be removed without the consent of the Employer. Subject to specific insurance options the contractor could remain responsible for any loss or damage. Removal would be a breach of contract, and the Employer could therefore claim from the Contractor for any losses suffered through unauthorised removal. This would apply even though the materials or goods have not been included in any payment.
- Unfixed materials or goods, either on or off site, that have been included in a payment are to become the property of the Employer, and the Contractor is thereby prevented from disputing ownership.
- Similar conditions regarding non-removal must be included in any subcontracts to protect the Employer.

Off site listed items

Both Alternative A and Alternative B include provisions for payment for materials or good or items that are prefabricated for inclusion in the Works and stored off site. If they are to be included in an application for payment prior to their delivery, they must be listed and the list annexed to the Employer's requirements. Items may be 'uniquely identified' or not, but the Employer need not pay for any off site items not listed. Certain pre-conditions must be fulfilled:

- the Contractor has provided reasonable proof that the property is vested in it;
- if required (by an entry in the contract particulars), the Contractor has provided a bond in favour of the Employer for uniquely identified listed items;
- the Contractor has provided a bond for items that are not uniquely identified;
- the listed items are in accordance with the Contract;
- the listed items are 'set apart' or clearly marked and identified;
- the Contractor provides proof that the items are insured against specified perils until delivery on site.

Payment procedure

The due date for interim payments is:

- Alternative A – at the completion of stages specified in the contract particulars until the application of the last stage then at monthly intervals or, if later in each case, the date of receipt of the Contractor's interim application.
- Alternative B – at the monthly dates specified in the contract particulars up to the due date for the final payment or, if later in each case, the date of receipt of the Contractor's interim application.

Following the Contractor's application for payment the Employer must follow the strict timetable for the notice and payment procedure. The final date for payment is 14 days from its due date. Not more than 5 days after the due date, the Employer must give a payment notice to the Contractor stating the amount of payment to be made, the sum due on the due date and the basis on which that sum has been calculated. The notice must be issued whether or not the Employer intends to make any deduction from the amount applied for. Should the Employer wish to pay less than the sum stated as due in the payment notice or interim application, a pay less notice must be issued to the Contractor not later than 5 days before the final date for payment stating the sum due at the date the notice was given and the basis on which that sum has been calculated. If no notices are issued by the Employer, the amount stated in the application for payment must be paid in full.

If the Employer fails to pay the amounts due simple interest, set at 5 per cent over the base rate of the Bank of England, accrues from the final date for payment until the amount is paid. The Contractor can issue a notice of suspension and if, after 7 days, payment has not been received, the Works can be suspended. Work must be resumed as soon as payment is made and any delay caused could be a relevant event.

Interim payment on practical completion

Under Alternative A it would be advisable to have one of the stages at practical completion. Under Alternative B, application for payment is made monthly at the specified Interim Valuation Date. Half the retention is released at practical completion and application for payment can be made monthly.

VAT

As the contract sum is exclusive of VAT, in addition to any sum certified, the Employer will have to pay the amount of any VAT properly chargeable in respect of any payment made under it. The precise total should be ascertained by the Contractor and included on their invoice.

Practical Completion Certificate

Assessing practical completion

The contract does not state who decides or define when, practical completion is achieved. As this could cause difficulties, the definition used in the JCT Major Project Construction Contract might be of help; it states, '*Practical Completion takes place when the project is complete for all practical purposes and, in particular:*

- *the relevant Statutory Requirements have been complied with and any necessary consents or approvals obtained;*
- *neither the existence nor the execution of any minor outstanding works would affect its use;*
- *any stipulations identified by the Requirements as being essential for Practical Completion to take place have been satisfied; and*
- *the health and safety file and all "as built" information and operating and maintenance information required by this Contract to be delivered at Practical Completion has been so delivered to the Employer.'*

As contractual responsibility for quality control rests entirely with the Contractor, it is advisable for the Employer (and any Employer's agent) not to get too involved with events on site. As the practice of issuing 'snagging lists' could lead to confusion over liability and cause problems at a future date if the completion of the Works is disputed, the best course may be to draw attention to typical items, but make it clear that any list is indicative and not comprehensive. Any 'handover' meetings should be viewed as introducing the finished project to the Employer as there will be more reliance on the Contractor to explain the operation and maintenance of the building than might be the case with traditional procurement.

Practical completion

The Contractor is obliged to complete by the date stated in the contract or any revised date. The practical completion statement must be issued by the Employer when:

- practical completion of the Works has been achieved;
- the Contractor has provided the health and safety file or any information required by the Principal Contractor or Principal Designer for the preparation of the health and safety file ;
- as-built drawings, related information and any maintenance and operating instructions specified in the contract documents or required by the Employer, have been supplied.

The date of practical completion is important because the following occurs:

- half of the retention will be released;
- the rectification period begins and the Employer will inevitably become involved in managing and programming any outstanding work;
- where insurance option A applies the Employer will become responsible for insurance of the Works;
- the Contractor's liability for liquidated damages ends;

- the Employer will be the 'occupier' for the purposes of the Occupiers' Liability Act 1957 and the Occupiers' Liability Act 1984, they also may be subject to claims regarding health and safety.

Health and safety

It would be good practice to remind the Principal Contractor or/ and the Principal Designer some weeks before practical completion of their obligations under the CDM Regulations. The statement of practical completion should be withheld until all significant health and safety information has been received and the Employer is not in breach of the CDM Regulations.

At the end of the project the Principal Designer or Principal Contractor must pass the health and safety file to the client. It should be made clear in the employer's requirement that this is at practical completion. Where the Contractor is not the Principal Contractor they must provide, upon the written request of the Principal Contractor, information reasonably required for the completion of the health and safety file. This written request is not a condition of the CDM Regulation; if not received, it would not absolve the Contractor of their duties to provide information.

Use or occupation before practical completion

The Employer, subject to the consent of the Contractor and the insurers, may use or occupy the site or the Works. Great care must be taken to agree to all the contractual and insurance consequences before the occupation takes place. In certain circumstances an additional insurance premium can be added to the contract sum.

Any arrangement for occupation outside the terms of the contract should be covered by a properly drafted agreement signed by both parties.

Section Completion Certificate

Assessing section completion

The contract does not state who decides or define when, section completion is achieved. As this could cause difficulties, the definition used in the JCT Major Project Construction Contract might be of help; it states, *'Practical Completion takes place when the project is complete for all practical purposes and, in particular:*

- *the relevant Statutory Requirements have been complied with and any necessary consents or approvals obtained;*
- *neither the existence nor the execution of any minor outstanding works would affect its use;*
- *any stipulations identified by the Requirements as being essential for Practical Completion to take place have been satisfied; and*
- *the health and safety file and all "as built" information and operating and maintenance information required by this contract to be delivered at practical completion has been so delivered to the Employer.'*

As contractual responsibility for quality control rests entirely with the Contractor, it is advisable for the Employer (and any Employer's agent) not to get too involved with events on site. As the practice of issuing 'snagging lists' could lead to confusion over liability and cause problems at a future date if the completion of the section is disputed, the best course may be to draw attention to typical items, but make it clear that any list is indicative and not comprehensive. Any 'handover' meetings should be viewed as introducing the finished project to the Employer as there will be more reliance on the Contractor to explain the operation and maintenance of the building than might be the case with traditional procurement.

Section completion

The Contractor is obliged to complete by the date stated in the contract or any revised date. The section completion statement must be issued by the Employer when:

- practical completion of the section of the Works has been achieved;
- the Contractor has provided the health and safety file or any information required by the Principal Contractor or Principal Designer for the preparation of the health and safety file;
- as-built drawings, related information and any maintenance and operating instructions specified in the contract documents or required by the Employer, have been supplied.

The date of practical completion is important because for each section the following occurs:

- half of the retention will be released;
- the rectification period begins and the Employer will inevitably become involved in managing and

programming any outstanding work;

- where insurance option A applies the Employer will become responsible for insurance;
- the Contractor's liability for liquidated damages ends;
- the Employer will be the 'occupier' for the purposes of the Occupiers' Liability Act 1957 and the Occupiers' Liability Act 1984, they also may be subject to claims regarding health and safety.

Health and safety

It would be good practice to remind the Principal Contractor or/ and the Principal Designer some weeks before section completion of their obligations under the CDM Regulations. The statement of section completion should be withheld until all significant health and safety information has been received and the Employer is not in breach of the CDM Regulations.

At the end of the construction phase the Principal Designer or Principal Contractor must pass the health and safety file to the client. It should be made clear in the employer's requirement that this is at practical completion of each section. Where the Contractor is not the Principal Contractor they must provide, upon the written request of the Principal Contractor, information reasonably required for the completion of the health and safety file. This written request is not a condition of the CDM Regulation; if not received, it would not absolve the Contractor of their duties to provide information.

Use or occupation before practical completion

The Employer, subject to the consent of the Contractor and the insurers, may use or occupy any part of the site or the Works. Great care must be taken to agree to all the contractual and insurance consequences before the occupation takes place. In certain circumstances an additional insurance premium can be added to the contract sum.

Any arrangement for occupation outside the terms of the contract should be covered by a properly drafted agreement signed by both parties.

Non-Completion Notice

Non-completion

If the completion date has been reached and the Contractor has failed to complete, the Employer is required issue a notice. It is important that this notice be issued in the event of any failure to complete the Works by the completion date, as liquidated damages cannot be claimed if:

- a notice of failure to complete has not been issued; and
- the Employer has not informed the Contractor in writing that payment or deduction of damages may be required.

Although the contract conditions do not give a time-scale for the issue of the notice it is suggested that it should be issued immediately after the completion date has passed. If a new completion date is fixed the notice is cancelled automatically; notices about further adjustments to the completion date can be issued if necessary. Although there is no requirement to state the completion date that the Contractor has failed to achieve, provision has been made for entering this date to avoid any uncertainty.

Where sectional completion applies, a separate notice should be issued for each section affected.

Liquidated damages

The Employer may deduct liquidated damages from any amounts due under the contract, or reclaim them as a debt, if the following conditions have been met:

- the Contractor has failed to complete by the relevant completion date;
- the Employer has issued a Non-Completion Notice;
- the Employer has fulfilled all duties with respect to the award of extensions of time;
- the Employer has given the Contractor written notice before the due date that payment will be required or deducted from monies due (as well as a 'Pay Less Notice', a separate notice is required for making the Contractor aware of the terms by which payment or deduction of damages will be made).

Notification has to be given in writing not later than 5 days before the final date for payment of the amount due. If the Employer wishes to deduct damages from the sum due, this must be made clear before the due date of issue of the final payment.

The rate must be calculated on the basis of a genuine pre-estimate of the loss likely to be suffered. It should not be out of all proportion to the legitimate commercial interests of making sure that the work is completed on time. If sectional completion applies there could be a separate rate of damages for each section. Once the rate has been agreed, both parties are bound irrespective of whether the actual loss is significantly less or more then the recoverable sum. If "nil" is inserted, this may preclude the Employer from claiming any damages at all, whereas if the clause is left blank the Employer may be able to claim general damages.

JCT MW/ MWD 2024 Minor Works Building Contracts

Architect/ Contract Administrators Instruction

Power to issue instructions

Only the Architect/ Contract Administrator have the power to issue instructions. Any verbal instructions will not have any effect until they are confirmed in writing by the Architect/ Contract Administrator. Use an Architect's or Contract Administrator's instruction form in preference to writing a letter, as it is clearly perceived as an instruction and recorded as such. In issuing an instruction, ensure that it is empowered by a particular contract condition and state this in the instruction. Any issues with health and safety implications must be brought to the attention of the Principal Designer and/ or Principal Contractor.

All instructions the Architect/ Contract Administrator is empowered to issue must be complied with as soon as reasonably possible. If the Employer gives an instruction other than through the Architect/ Contract Administrator, the Contractor would be under no obligation to comply. If the Contractor did carry out such an instruction, a court might consider that there had been an agreed amendment to the contract.

Where the contract states that some instructions SHALL be issued in particular circumstances, these are a contractual obligation and failure would normally constitute a breach of contract by the Employer, for example:

- Correction of inconsistencies.
- Expenditure of provisional sums.
- Issuing of further information.
- Reinstatement of loss or damage.
- Defects arising in the rectification period.
- Consent to sub-contract.

The contract also states that instructions MAY be issued for:

- Exclusion from the Works.
- Variations.

If the Contractor confirms an oral instruction in writing, the Architect/ Contract Administrator would be wise to check it and immediately respond as silence may be deemed to be approval of the Contractor's version. If the Contractor carries out a variation on the basis of an oral instruction only, this would be at the Contractor's risk

Compliance with statute

The Contractor is under no specific obligation to search for divergence between what the contract requires and statutory requirements but, if any is discovered they must issue a notice to the Architect/ Contract Administrator so an instruction can be issued to clarify the situation.

Provision of information

The Architect/ Contract Administrator must supply sufficient information to allow the Contractor to carry out the works. Although it is not a contract condition to state the clause number that empowers each instruction, it would be sound practice to include it. Any further information required to execute the Works or if any of the information supplied introduces changes or additions to the Works, it should be covered by an instruction.

Variations

Where an instruction requires a change in the Works, including the order or period to be they are to be carried out, the Architect/ Contract Administrator and Contractor should try to agree a price. If agreement cannot be reached, the Architect/ Contract Administrator values the instruction using relevant prices in the pricing document.

Interim Certificate

Certification

The Architect/ Contract Administrator are responsible for both valuations and issuing certificates. Each certificate

must be issued within 5 days after the due dates stated in the contract and the Architect/ Contract Administrator must not be influenced by the Employer to delay certification or withhold amounts properly due. The first Interim Valuation Date is to be one month after the works commenced as identified in the Contract Particulars with all following Interim Valuations to be issued at no more than one month intervals. Procedures for issuing payment certificates to the Employer with a copy to the Contractor should be established at the outset, either by setting it out in the contract documents or agreeing it at a pre-contract meeting.

Coverage of the certificate

Interim payments should include the value of work properly executed and materials and goods stored on site. No work should be included that has not been properly executed whether or not it is about to be remedied or the retention is adequate to cover remedial work. Where amounts have been included for work that subsequently proves to be defective, the value can be omitted from the next certificate.

Under the Sale of Goods Act, a seller is entitled to retain ownership of goods until paid. The Contractor will therefore not be entitled to payment for products not incorporated into the Works, which are subject to reservation of title. Subcontracts and contracts for supply (including contract for supply placed by subcontractors) should expressly provide that property in products shall pass unconditionally to the Contractor not later than their delivery to site. If payment is authorized without making sure the Contractor is able to pass the property in them, an action for negligence could be brought if, in the event of the Contractor's insolvency, the owner of the goods tries to reclaim them. There is no contractual provision for including the value of off-site materials, goods or prefabricated items.

Include the valuation of any relevant variations, reinstatement after fire etc and amounts in respect of the fluctuations provisions if applicable.

Amounts due

A percentage stated in the Contract Particulars, default 95%, of the value ascertained should be certified up to practical completion. On and after practical completion the percentage stated in the Contract Particulars, default 97½%, should be certified and the remainder released with the final certificate. The contract does not state the Employer to be a trustee for the beneficiaries of the retention, therefore there is no obligation for the Employer to place the retained sum in a separate account.

Payment procedure

Up to the due date for the final payment, the due dates for interim payments is 7 days after the Interim Valuation Date. Payment is to be made by the Employer to the Contractor following the strict timetable in the contract:

- Not later than 5 days after the due date the Architect/ Contract Administrator must issue an interim certificate.
- Final date for payment of the certified sum, along with any VAT chargeable to the Employer is 14 days after the due date.
- Should the Employer wish to withhold or deduct any amount from the certificate or the contractor's payment notice (for non-compliance with instructions, liquidated damages or the making of statutory tax deductions) a notice must be issued to the Contractor not later than 5 days before the final date for payment. This must state the sum to be paid and the basis on which that sum has been calculated.
- If no notices are issued by the Employer the certified amount must be paid in full.
- If either Party fails to pay a sum either in full or part of it by the due final payment date interest shall be recoverable as a debt.

Failure to issue certificate

If an interim certificate is not issued in accordance with the contract, the Contractor may give a payment notice to the Architect/ Contract Administrator stating the amount considered due and the basis on which the sum has been calculated. The final date for payment is then postponed by the same number of days as the number of days after expiry of the five days period that the payment notice is given by the Contractor. If the Employer intends to pay less than the sum stated in the Contractor's notice, a notice must be issued by the Employer to the Contractor not later than 5 days before the final date for payment, stating the sum to be paid and the basis on which that sum has been calculated.

VAT

As the contract sum is exclusive of VAT, in addition to any sum certified, the Employer will have to pay the amount of any VAT properly chargeable in respect of any payment made under it. Whilst it is good practice to advise the Employer that this additional amount may be due, the Contract administrator is not qualified to make that ascertainment. VAT amounts should be calculated by the Contractor and included on their invoice.

Non-Completion Notice

Non-completion

Although suggested good practice, the issuing of a non-completion certificate is not a condition precedent to the deduction or recovery of damages.

Liquidated damages

The Employer is the only party that may decide to deduct liquidated damages from any amounts due under the contract, or reclaim them as a debt, if the following conditions have been met:

- the Contractor has failed to complete by the due date;
- the Architect/ Contract Administrator has fulfilled all duties with respect to the award of extensions of time;
- the Employer has given the Contractor written notice at least five days prior to the final date for payment (as well as a 'Pay Less Notice', a separate notice is required for making the Contractor aware of the intention to deduct liquidated damages).

The rate must be calculated on the basis of a genuine pre-estimate of the loss likely to be suffered. It should not be out of all proportion to the legitimate commercial interests of making sure that the work is completed on time. Once the rate has been agreed and is inserted into the Contract Particulars, both parties are bound irrespective of whether the actual loss is significantly less or more then the recoverable sum. If "nil" is inserted, this may preclude the Employer from claiming any damages at all, whereas if the clause is left blank the Employer may be able to claim general damages. If the Employer wishes to deduct damages from the sum due under the final certificate, the Contractor must be notified of this intention before the date of issue of the final certificate.

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Adjustment of Completion Date

Notice of delay

The Contractor must give notice to the Architect/ Contract Administrator when progress is being or is likely to be delayed. Although the cause of the delay should be stated, the Contractor is not required to identify whether it is a relevant event. Further information about any of the matters raised in the notice can be requested by the Architect/ Contract Administrator but this must never be regarded as a delaying tactic. An extension that later appears insufficient in the light of further information can always be adjusted at review.

Subject to the review procedure after practical completion, the Contractor's notice appears to be a condition precedent for the granting of an extension of time and, therefore, the Architect/ Contract Administrator is not obliged to issue an extension until the Contractor has properly complied. A further notice must be issued if there is any further delay.

Relevant events

An extension of time can only be given if a relevant event occurs.

Note:

- force majeure refers to all circumstances independent of the will of man, and which it is not in his power to control, including acts of God;
- weather must be exceptional and adverse. The effect of the weather is assessed at the time the work is actually carried out, not when it should have been according to the Contractor's programme;
- Specified Perils can under certain circumstances include events caused by the Contractor's own negligence;
- very wide protection is afforded with respect to strikes, and not simply those affecting the Works but also those causing difficulties in preparation and transportation of goods and materials or the preparation of the contractor's designed portion. Such strikes will not necessarily be confined to the UK and, given the extent of overseas imports, the effects could be considerable;
- any impediment by the Employer, Architect, Contract Administrator, Quantity Surveyor or any Employer's Person (including those carrying out Statutory works), including failure to supply information, including at the times shown on the information release schedule, unless caused or contributed to by the Contractor;
- site access or delay in possession of the site may be grounds for an extension of time;
- work by statutory undertakers only covers situations where work is generally done in pursuance of statutory duties in relation to the Works;
- government intervention after base date (including the passing of new or amended laws and the publication of industry guidance by the Construction Leadership Council or its successor);
- epidemics which limit the availability or use of labour or services required for the works, or that prevent or delay the contractor from securing the necessary goods or materials required for the works.

Assessment

If, having received the appropriate notice and particulars from the Contractor, in the opinion of the Architect/ Contract Administrator the cause of delay is a relevant event and is likely to delay the completion of the Works beyond the completion date, then the Architect/ Contract Administrator is obliged to make a fair and reasonable extension of time. Although there is no requirement for the Architect/ Contract Administrator to say which events have been taken into account, it would be sensible to do so. It would be unwise to apportion time specifically against individual events.

There is no time limit on when the Architect/ Contract Administrator should respond to the Contractor's notice but, as failure to grant an extension properly due could result in time being at large, it should be dealt with reasonably quickly and should not be set aside until the end of the project. All relevant events or omission instructions that have been taken into account must be stated; refer to a clearly identified attached sheet if there is insufficient room on the form.

Review of extensions of time after practical completion

If the completion date has passed and practical completion has not been achieved, the Architect/ Contract Administrator may make a final assessment and issue a final notification, but must do so not later than 12 weeks after the date of practical completion of works or section. The final review may extend the date previously fixed but may not bring it forward, although the Architect/ Contract Administrator may be able to offset a reduction or omission of work against the effect of another delaying event. If it is decided that no further extension is due, there is no requirement to notify the Contractor but it would be reasonable to do so. If a relevant event occurs after the date for completion or any extended completion date, when the Contractor is in "culpable delay", any extension is added onto the date that has passed.

Architect/ Contract Administrators Instruction

Power to issue instructions

Only the Architect/ Contract Administrator have the power to issue instructions and they should be in writing. Use an Architect's or Contract Administrator's instruction in preference to writing a letter, as it is clearly perceived as an instruction and recorded as such. In issuing an instruction, ensure that it is empowered by a particular contract condition and state this in the instruction. Any issues with health and safety implications must be brought to the attention of the Principal Designer or/ and Principal Contractor.

The Contractor must comply forthwith with every instruction that the Contract Administrator is empowered to issue. Except:

- a variation in relation to access and use of the site, limitations of working space and hours or the execution or completion of the work in any specific order, if the Contractor makes a reasonable objection;
- where it might injuriously affect the efficacy of CDP design or the contractor's compliance with applicable statutory requirements.

If the Employer gives an instruction other than through the Architect/ Contract Administrator, the Contractor would be under no obligation to comply. If the Contractor did carry out such an instruction, a court might consider that there had been an agreed amendment to the contract.

As there is no reference to oral instructions, the Contractor would not be obliged to comply and would be wise to request all instructions be confirmed immediately in writing before taking any action. If the Contractor carries out a variation on the basis of an oral instruction, the Architect/ Contract Administrator could later sanction the instruction in writing, but the Contractor would be taking a risk. As the contract contains no provision to cover the situation where the Contractor confirms an oral instruction, it would be prudent to respond promptly, reminding the Contractor of the correct procedure under the contract.

Where the contract states that some instructions SHALL be issued, these are a contractual obligation and failure will constitute a breach of contract by the Employer, for example:

- Issuing of contract documents and construction information.
- Levels and setting out.
- Correction of inconsistencies, errors and omissions.
- Expenditure of provisional sums.
- Dissatisfaction of executed work.
- Contractor's insurance of liability of Employer.
- Named persons as sub-contractors.

The contract also states that instructions MAY be issued for:

- Defects to be rectified during rectification period.
- Consent to sub-contract.
- Variations.
- Postponement of work.
- Opening up and testing.
- Work not in accordance with contract.
- Removal of work.

- Exclusion of persons.

Compliance with statute

If the Contractor or the Architect/ Contract Administrator finds a divergence between any contract document or instructions and statutory requirements, then immediate written notice must be given to the other. The Contractor is under no obligation to search for divergence, but is of course under a general obligation to use reasonable skill and care in carrying out the works. If the divergence is with the Contractor's Designed Portion (CDP) documents the Contractor must inform the Architect/ Contract Administrator in writing of their proposed amendment. Upon discovery of any divergence the Contract Administrator must issue an instruction within seven days (fourteen days from receipt of Contractor's proposed amendments to CDP). This is treated as a variation and may therefore give rise to an extension of time and reimbursement of direct loss and expense.

In an emergency, the Contractor may need to take sufficient immediate action to comply with statutory requirements and is required to notify the Architect / Contract Administrator of the emergency and actions taken. Although there is no obligation for the Architect/ Contract Administrator to issue an instruction, unless the emergency has arisen because of a divergence between the statutory requirements and the contract documents, it would be advisable to do so to enable the event and associated cost to be recorded

Provision of information

The Architect/ Contract Administrator's obligations to provide information are:

- Setting-out information.
- Information shown on the information release schedule.
- Further drawings or details reasonably necessary to explain and amplify the contract drawings.

Although none of the information is required to be released under a Architect/ Contract Administrator's instruction, it is good practice as it enables the compliance with instructions provisions to be brought into operation if necessary. If any of the information supplied introduces changes or additions to the Works, then it must be covered by a Architect/ Contract Administrator's instruction requiring a variation. Provided any cost implications are identified and added into the cost columns on the Architect/ Contract Administrator's instructions, NBS Contract Administrator will maintain a running total of costs incurred to date.

Valuation of variations

The Employer and Contractor should try to agree the valuation of variations, preferably before the work is carried out. If agreement cannot be achieved the instruction is valued by the Quantity Surveyor according to the Valuations rules stated within the contract.

Interim Certificate

Valuations and ascertainment

Subject to statutory timetables for mandatory stage payments, valuations are made by the Quantity Surveyor when the Architect/ Contract Administrator considers them necessary for ascertaining the amount due in an interim certificate. They should cover the amount due as at the Interim Valuation Date.

The Contractor has the right to submit their own assessment of the valuation for an interim certificate to the Quantity Surveyor not later than the Interim Valuation Date. The Quantity Surveyor must then make an interim valuation. If the application is rejected, a statement must be issued by the Quantity Surveyor to the Contractor in the same format as the assessment, showing the areas of disagreement.

The roles of the Quantity Surveyor and the Architect/ Contract Administrator are quite distinct, and the valuation figure will not necessarily be the same as that on the interim certificate.

Certification

The Architect/ Contract Administrator is responsible for both valuations and issuing certificates and must not be influenced by the Employer to delay certification or withhold amounts properly due. Payment is made by the Employer to the Contractor after the issue of certificates by the Architect/ Contract Administrator.

Due dates

These will normally be at monthly intervals, as specified in the contract particulars up to the due date for final payment. The due date is very important, since the interim certificate is to be issued within 5 days of the due date.

Coverage of the certificate

Interim certificates must state the amount due, to what it relates and the basis on which it was calculated. This requirement might be met by attaching a copy of, or a brief summary of, the valuation by the Quantity Surveyor. Alternatively, a specially-prepared statement might be appended. No work should be included that has not been properly executed whether or not it is about to be remedied or the retention is adequate to cover remedial work. Where amounts have been included for work that subsequently proves to be defective, the value can be omitted from the next certificate.

Calculation of amount due

This can be summarised as follows.

Gross valuation to date:

- Value of work properly executed.
- Materials and goods properly on site.
- Off-site listed items.

Less amounts deducted:

- Advance payment due for reimbursement to Employer
- Total amount previously certified.
- Any sums paid in respect of an Interim Payment Notice (If a payment notice has been issued by the Contractor since the last Interim Certificate was issued by the Architect/ Contract Administrator, then the amount must be deducted in calculating the amount due).
- Various deductions.
- Retention.

Some of the items that must be included in the gross valuation are subject to a reduction of 5% and it is usual for half of this withheld amount to be released upon practical completion, and the remaining half with the final certificate. Different percentages can be inserted into the Contract Particulars.

This "percentage" is commonly referred to as retention, although the Payment guidance in the Intermediate Building Contract does not use that term. The contract does not therefore refer to a reduction or deduction of 5% but to the 'percentages of value' which are set in contract particulars at a default percentage of 95%.

The Employer is a trustee of the withheld percentage for the Contractor, but is not obliged to invest it for the Contractor, and would have the benefit of any interest which accrues.

Deductions

The contract expressly gives the Employer the right to make certain deductions from the sums certified as due to the Contractor. This is distinct from amounts that should be deducted before arriving at the sum to be shown on the certificate – for example, deductions from the Contract Sum where incorrect setting out has been accepted. Notice of the deductions should have been given, as stated in payment procedures.

Deductions authorized by the contract arise in respect of:

- non-compliance with Architect/ Contract Administrator's instructions;
- errors in inaccurate setting out
- default in taking out or maintaining insurance premiums;
- Breach of Joint Fire Code - Remedial measures
- fluctuations provisions other than by means of adjustment;
- fluctuations in named sub-contractors premium;
- amounts allowable by the Contractor under the terrorism cover provisions;
- payment or allowance of liquidated damages;
- operation of the Construction Industry Scheme (CIS).

Payment procedure

The Architect/ Contract Administrator and Employer must follow the strict timetable below for notices and payment procedures:

- Not later than 5 days after the due date the Architect/ Contract Administrator must issue an interim certificate.
- The final date for each interim and final payment by the Employer is 14 days from the due date.
- Should the Employer wish to pay less than the sum stated or withhold or deduct any amount from the certificate (for non-compliance with instructions, liquidated damages or the making of statutory tax deductions) a Pay Less notice must be issued to the Contractor not later than 5 days before the final date for payment. This must state the sum to be paid and the basis on which that sum has been calculated.
- If no Pay Less Notice is issued by the Employer the certified amount must be paid in full.

Failure to issue certificate

- If an interim certificate is not issued in accordance with the contract, and the Contractor had made a Payment notice, the Payment notice shall become an Interim Payment Notice.
- Where the contractor had not made a payment application, they may give a payment notice to the Quantity Surveyor stating the amount considered due and the basis on which the sum has been calculated.
- The final date for payment is then postponed by the same number of days as the number of days after expiry of the five days period that the payment notice is given by the Contractor.
- If the Employer intends to pay less than the sum stated in the Contractor's notice, a pay less notice must be issued by the Employer to the Contractor not later than 5 days before the final date for payment, stating the sum to be paid and the basis on which that sum has been calculated.

NOTE

- The due date is of particular importance under the current regime. Architects/ Contract Administrators should be diligent to issue interim certificates within 5 days of the due date.

Unfixed materials and goods

The interim certificate should include the value of materials that have been delivered to the site but not yet incorporated in the Works. Under the Sale of Goods Act, a seller is entitled to retain ownership of goods until paid. The Contractor will therefore not be entitled to payment for products not incorporated into the Works, which are subject to reservation of title. Subcontracts and contracts for supply (including contract for supply placed by subcontractors) should expressly provide that property in products shall pass unconditionally to the Contractor not later than their delivery to site. If payment is authorized without making sure the Contractor is able to pass the property in them, an action for negligence could be brought if, in the event of the Contractor's insolvency, the owner of the goods tries to reclaim them.

The contract has the following detailed provision to protect the Employer:

- Unfixed materials and goods that have been delivered to the site and are intended for the Works may not be removed without the written consent of the Architect/ Contract Administrator. Removal would be a breach of contract, and the Employer could therefore claim from the Contractor for any losses suffered through unauthorized removal. This would apply even though the materials or goods have not been included in any certificate.
- Unfixed materials or goods, either on or off site, that have been included in a certificate that has been paid are to become the property of the Employer, and the Contractor is thereby prevented from disputing ownership.
- Similar conditions regarding non-removal must be included in any subcontracts to protect the Employer.

Off site listed items

If materials or goods or items that are prefabricated for inclusion in the works and stored off site are to be included in an interim certificate prior to their delivery, they must be listed. The Architect/ Contract Administrator has no discretionary power to certify any off-site items, other than those that have been listed. They may be 'uniquely identified' or not uniquely identified but the list must be annexed to the contract documents and certain pre-conditions must be fulfilled:

- the Contractor has provided reasonable proof that the property is vested in them;
- if required (by an entry in the Contract Particulars), the Contractor has provided a bond for uniquely identified listed items;
- the Contractor has provided a bond for listed items not uniquely identified:

- the listed items are in accordance with the contract;
- the listed items are "set apart'" or clearly marked and identified;
- the Contractor provides proof that the items are insured against specified perils until delivery to the site.

VAT

As the contract sum is exclusive of VAT, in addition to any sum certified, the Employer will have to pay the amount of any VAT properly chargeable in respect of any payment made under it. Whilst it is good practice to advise the Employer that this additional amount may be due, the Architect/ Contract administrator is not qualified to make that ascertainment. VAT amounts should be calculated by the Contractor and included on their invoice.

Non-Completion Certificate

Non-completion

If the completion date has been reached for the Works or a section and the Contractor has failed to complete, the Architect/ Contract Administrator is required to certify the fact. It is important that this certificate be issued in the event of any failure to complete the Works by the completion date, as liquidated damages cannot be claimed if:

- a certificate of failure to complete has not been issued; and
- the Employer has not informed the Contractor in writing that payment or deduction of damages may be required.

Although the contract conditions do not give a time-scale for the issue of the certificate, it is suggested that it should be issued immediately after the completion date has passed. If a new completion date is fixed, the certificate is cancelled automatically; further certificates can be issued if necessary. Although there is no requirement to state the completion date that the Contractor has failed to achieve, provision has been made for entering this date to avoid any uncertainty.

Where sectional completion applies, a separate certificate should be issued for each section affected.

Liquidated damages

The Employer is the only party that may decide to deduct liquidated damages from any amounts due under the contract, or reclaim them as a debt, if the following conditions have been met:

- the Contractor has failed to complete by the due date;
- the Architect/ Contract Administrator has issued a certificate of non-completion;
- the Architect/ Contract Administrator has fulfilled all duties with respect to the award of extensions of time;
- the Employer has given the Contractor written notice before the date of the final certificate that payment will be required or deducted from monies due (as well as a 'Pay Less Notice', a separate notice is required for making the Contractor aware of the terms by which payment or deduction of damages will be made).

Notification has to be given in writing not later than 5 days before the final date for payment of the amount due under an interim or the final certificate. If the Employer wishes to deduct damages from the sum due under the final certificate.

The rate must be calculated on the basis of a genuine pre-estimate of the loss likely to be suffered. It should not be out of all proportion to the legitimate commercial interests of making sure that the work is completed on time. If sectional completion applies, there could be a separate rate of damages for each section. Once the rate has been agreed, both parties are bound irrespective of whether the actual loss is significantly less or more then the recoverable sum. If "nil" is inserted, this may preclude the Employer from claiming any damages at all, whereas if the clause is left blank the Employer may be able to claim general damages.

Certificate of Making Good

Rectification period

The Contractor is required to make good any defects, shrinkage or other faults which appear during the rectification period which result from materials, goods or workmanship not being in accordance with the contract. This does not include errors in design information supplied to the Contractor or general wear and tear resulting from occupation by the Employer.

The Contractor must comply with any instruction which is issued within a reasonable time. Unless there is a pressing need to remedy a defect during the rectification period, defects are generally left until the end of the period.

Where sectional completion applies, each section will have a separate rectification period. If the Employer has taken partial possession the rectification period for the 'relevant part' runs from the 'relevant date' given in the statement of partial possession.

The standard rectification period where completion by sections applies or does not apply is 6 months.

End of the rectification period

Although the Architect/ Contract Administrator must notify the Contractor, there is no obligation under the contract to issue a schedule of defects. Notification can take place whenever a defect is discovered until not later than 14 days after the expiry of the rectification period; the default being six months unless a different period is stated in the contract. It would be advisable to prepare a comprehensive schedule of defects, which should also be issued to the Principal Designer and/ or Principal Contractor as the operation of making good the defects could constitute a notifiable project.

If the Employer agrees, the Architect/ Contract Administrator may decide to accept the defective work and make an appropriate deduction from the contract sum. Care should be taken to establish the full extent of the problem before such a course of action is taken, as it is unlikely that the Employer would thereafter be able to claim for consequential problems or further remedial work.

Defects made good

When the Architect/ Contract Administrator is satisfied that all the required defects have been made good, a certificate of making good must be issued. This certificate is one of the pre-conditions for the issue of the final certificate.

The contract is silent about defects appearing after the issue of the certificate but before the issue of the final certificate. The Contract Administrator no longer has the power to instruct that these be made good but there would be two possible courses of action:

- To make an agreement with the Contractor to rectify the defects before the final certificate is issued. If the Contractor refuses to do this, an amount could be deducted from the contract sum to cover the cost of making good the work, but that would involve some risk to the Employer.
- The less risky course would be to have the defective work rectified by another contractor, and deduct the amount paid from the contract sum. This would involve a delay to the issue of the final certificate, and could be disputed by the Contractor.

Although liability for defective work not notified by the Employer or appearing after final payment is still the responsibility of the Contractor, they no longer have the right to return to site to make good the defects. An action at common law can be brought by the Employer.

Adjustment of Completion Date

Notice of delay

The Contractor must notify the Architect/ Contract Administrator in writing when progress is being or is likely to be delayed, listing out the material circumstances and causes including identifying any relevant events. This notice appears to be a condition precedent for the granting of an extension of time and, therefore, the Architect/ Contract Administrator is not obliged to issue an extension until the Contractor has properly complied.

For each relevant event the expected effects, including an estimate of the likely consequence on the completion date, must be included with the notice or be issued as soon as possible. Further information about any of the matters raised in the notice can be requested by the Architect/ Contract Administrator not later than 14 days from receipt of the Contractor's particulars or notification, but this must never be regarded as a delaying tactic. An extension that later appears insufficient in the light of further information can always be adjusted at review.

Relevant events

An extension of time can only be given if a relevant event occurs. The Architect/ Contract Administrator must state which events have been taken into account.

Relevant events:

- force majeure refers to all circumstances independent of the will of man, and which it is not in his power to control, including acts of God;
- weather must be exceptional and adverse. The effect of the weather is assessed at the time the work is actually carried out, not when it should have been according to the Contractor's programme;
- Specified Perils can under certain circumstances include events caused by the Contractor's own negligence;
- very wide protection is afforded with respect to strikes, and not simply those affecting the Works but also those causing difficulties in preparation and transportation of goods and materials, or the preparation of the contractor's designed portion. Such strikes will not necessarily be confined to the UK and, given the extent of overseas imports, the effects could be considerable;
- suspension by the Contractor of any or all obligations under the contract;
- work by statutory undertakers only covers situations where work is generally done in pursuance of statutory duties in relation to the Work;
- government intervention after base date (including the passing of new or amended laws and the publication of industry guidance by the Construction Leadership Council or its successor);
- site access and any difficulty in movement on or around the site may be grounds for an extension of time;
- the discovery of antiquities, asbestos, contaminated material and unexploded ordnance (except to the extent that the presence of asbestos or contaminated material has been identified in the contract documents and/ or any such material has been brought onto site by the contractor/ contractor's person);
- epidemics which limit the availability or use of labour or services required for the works, or that prevent or delay the contractor from securing the necessary goods or materials required for the works.

Procedure

The Architect/ Contract Administrator must respond to the Contractor's notice and particulars as soon as is reasonably practicable but within 8 weeks or by the completion date, whichever is soonest. There is an obligation to respond to the Contractor's notice, even if no extension of time is granted. Failure to respond can affect the operation of fluctuation clauses and the right to liquidated damages. It is in everybody's interests that the revision be issued as soon as possible.

Assessment

If, after receiving the appropriate notice and particulars from the Contractor, in the opinion of the Architect/ Contract Administrator the cause of delay is a relevant event and is likely to delay the completion of the Works beyond the completion date, then the Architect/ Contract Administrator is obliged to make a fair and reasonable extension of time. After the first extension, the Architect/ Contract Administrator may take into account the omission of work and fix an earlier completion date, but not earlier than the original completion date stated in the contract particulars. Details of each relevant event or the omission instruction that has been taken into account should be stated; refer to a clearly-identified attached sheet if there is insufficient room on the form.

Although the term "extension of time" is used in this clause and elsewhere in the contract, the act of granting an extension (or reduction) of time is referred to as "fixing" a new (or earlier) completion date. The current completion date can also be confirmed if the events listed by the Contractor are not relevant events.

The operation of fixing completion date is independent of any adjustment of time made under the provisions of a Contractor's Variation Quotation.

Review of extensions of time after practical completion

If the completion date has passed and practical completion has not been achieved, the Architect/ Contract Administrator may make a final assessment and issue a final notification, but must do so not later than 12 weeks after the date of practical completion of works or section. This should take account of any relevant events, whether notified by the Contractor or not. If a relevant events occurs after the date for completion or any extended completion date, when the Contractor is in "culpable delay", any extension is added onto the date that has passed.

Architect/ Contract Administrators Instruction

Power to issue instructions

Only the Architect or Contract Administrator has the power to issue instructions. If a Clerk of Works is appointed they may issue 'directions', but these must be confirmed by an instruction to have effect.

All instructions must be in writing for them to take effect. Use an Architect's or Contract Administrator's instruction in preference to writing a letter, as it is clearly perceived as an instruction and recorded as such. In issuing an instruction, ensure that it is empowered by a particular contract condition and state this in the instruction. Any issues with health and safety implications must be brought to the attention of the Principal Designer or/ and Principal Contractor.

As soon as reasonably possible the Contractor must comply with every instruction that the Architect/ Contract Administrator is empowered to issue. Except:

- a variation referred to in relation to access to or us of any specific parts of the site, limitations of working space, limitations of working hours or the execution or completion of the work in any specific order if the Contractor makes a reasonable objection;
- an instruction relating to a Schedule 2 Quotation until a confirmed acceptance has been given;
- where it might injuriously affect the efficacy of Contractor's Designed Portion design;
- where the supply or use of instruction may infringe patent rights;
- where a named specialist is replaced or not named in the Contract documents;
- where the instruction might affect the contractor's compliance with applicable CDM Regulations or Building Regulations.

If the Employer gives an instruction other than through the Architect/ Contract Administrator, the Contractor would be under no obligation to comply. If the Contractor did carry out such an instruction, a court might consider that there had been an agreed amendment to the contract.

An oral instruction is of no immediate effect and must be confirmed in writing by the Architect/ Contract Administrator within seven days or if a Contractor confirms the oral instruction in writing it will then take effect seven days from the Contractor's confirmation provided the Architect/ Contract Administrator has not dissented in writing. If the Contractor carries out work on the basis of a verbal instruction, the Architect/ Contract Administrator can sanction it at anytime prior to the issue of the final certificate but the work would be at the contractor's risk.

Where the contract states that some instructions SHALL be issued, these are a contractual obligation and failure will constitute a breach of contract by the Employer, for example:

- Issuing of contract documents and construction information.
- Levels and setting out.
- Issuing of further drawings or details.
- Discrepancies and divergences.
- Defects arising in rectification period.

- Expenditure of provisional sums.
- Discovery of antiquities, asbestos, contaminated material or unexploded ordnance.
- Dissatisfaction of executed work.
- Contractor's insurance of liability of Employer.

The contract also states that instructions MAY be issued for:

- Confirmation of Clerk of Works directions.
- Consent to sub-contract.
- Variations.
- Postponement of work.
- Opening up and testing.
- Work not in accordance with contract.
- Workmanship not in accordance with the contract.
- Exclusion of persons.

Compliance with statute

If the Contractor, Architect or the Contract Administrator finds a divergence between any contract document or instructions and statutory requirements, then immediate written notice must be given to the other. The Contractor is under no obligation to search for divergence, but is of course under a general obligation to use reasonable skill and care in carrying out the works. If the divergence is with the Contractor's Designed Portion documents the Contractor must inform the Architect/ Contract Administrator in writing of their proposed amendment. Upon discovery of any divergence the Architect/ Contract Administrator must issue an instruction within seven days (fourteen days from receipt of Contractor's proposed amendments to Contractor's Designed Portion). This is treated as a variation and may therefore give rise to an extension of time and reimbursement of direct loss and expense.

In an emergency, the Contractor may need to take sufficient immediate action to comply with statutory requirements. Although there is no obligation for the Architect/ Contract Administrator to issue an instruction, unless the emergency has arisen because of a divergence between the statutory requirements and the contract documents, it would be advisable to do so to enable the event and associated cost to be recorded

Provision of information

The Architect/ Contract Administrator's obligations to provide information are:

- Contract Documents, contract Drawings and Specification / work schedules unless required otherwise in BIM Protocol or other communications protocol.
- Setting-out information.
- Descriptive schedules or other like documents.
- Information shown on the information release schedule.
- Further drawings or details reasonably necessary to explain and amplify the contract drawings.

Although none of the information is required to be released under an Architect/ Contract Administrator's instruction, it is good practice as it enables the provisions to be brought into operation if necessary. If any of the information supplied introduces changes or additions to the Works, then it must be covered by an Architect/ Contract Administrator's instruction requiring a variation. Provided any cost implications are identified and added into the cost columns on the Architect/ Contract Administrator's instructions, NBS Contract Administrator will maintain a running total of costs incurred to date.

Valuation

Variations and instructions relating to expenditure of provisional sums can be valued under the provisions of the contract, either in accordance with the valuation rules or through the submission of a Schedule 2 Variation Quotation. In both cases the valuation should include a sum in respect of any additional design work necessitated by the instruction.

Schedule 2 Variation Quotations

If it states in the instruction that a quotation is to be provided by the Contractor in accordance with Schedule 2, an estimate must be submitted to the Architect/ Contract Administrator within 21 days unless the Contractor makes reasonable objection within 7 days. If objection is made, the variation should not be carried out until the Architect/ Contract Administrator gives further instruction.

The estimate must include the direct cost of complying with the instruction, the period required for extension to the contract period and the sum acceptable in lieu of direct loss and expense, fair cost for preparation of quotation and indication on the additional resources that would be required and the method of carrying out the Variation. If the estimate is not agreed by the Employer within 7 days of receipt by the Quantity Surveyor, the Architect/ Contract Administrator must instruct the variation to be carried out and valued using the valuation rules change or withdraw the instruction.

Interim Certificate

Valuations and ascertainment

Subject to statutory timetables for mandatory stage payments, valuations are made by the Quantity Surveyor when the Architect/ Contract Administrator considers them necessary for ascertaining the amount due in an interim certificate.

The Contractor has the right to submit their own assessment of the valuation for an interim certificate to the Quantity Surveyor at least seven days before the due date and the Quantity Surveyor must then make an interim valuation. If the application is rejected, a statement must be issued by the Quantity Surveyor to the Contractor in the same format as the assessment, showing the areas of disagreement.

The roles of the Quantity Surveyor and the Architect/ Contract Administrator are quite distinct, and the valuation figure will not necessarily be the same as that on the interim certificate.

Certification

The Architect/ Contract Administrator is responsible for both valuations and issuing certificates and must not be influenced by the Employer to delay certification or withhold amounts properly due. Payment is made by the Employer to the Contractor after the issue of certificates by the Architect/ Contract Administrator.

Due Dates

These must be at monthly intervals as specified in the contract particulars up until the final payment. The due date is very important, since the Architect/ Contract Administrator must issue the interim certificate within 5 days of the due date.

Coverage of the certificate

Interim certificates must state the amount due on the due date and the basis on which it was calculated. This requirement might be met by attaching a copy of, or a brief summary of, the valuation by the Quantity Surveyor. Alternatively, a specially-prepared statement might be appended. No work should be included that has not been properly executed whether or not it is about to be remedied or the retention is adequate to cover remedial work. Where amounts have been included for work that subsequently proves to be defective, the value can be omitted from the next certificate.

Calculation of amount due

This is set out in detail and can be summarised as follows.

Gross valuation to date:

- Value of work properly executed.
- Materials and goods properly on site.
- Off-site listed items.

Less amounts deducted:

- Advance payment due for reimbursement to Employer.
- Total amount previously certified.
- Any sums paid in respect of an Interim Payment Notice (If a payment notice has been issued by the Contractor since the last Interim Certificate was issued by the Architect/ Contract Administrator, then the amount must be deducted in calculating the amount due).
- Various deductions.

- Retention.

The default Retention percentage is 3%. The Employer is a trustee of the Retention percentage for the Contractor, but is not obliged to invest it for the Contractor, and would have the benefit of any interest which accrues.

Deductions

The contract expressly gives the Employer the right to make certain deductions from the sums certified as due to the Contractor. Notice of the deductions should have been given, as stated in payment procedures.

Deductions authorized by the contract arise in respect of:

- non-compliance with Architect/ Contract Administrator's instructions;
- contractor errors;
- the cost of remedial measures undertaken by others, resulting from the contractor's breach of the Joint Fire Code;
- amounts allowable by the Contractor under the terrorism cover provisions;
- any applicable fluctuations that have not already been adjusted;
- default in taking out or maintaining insurance premiums;
- payment or allowance of liquidated damages;
- operation of the Construction Industry Scheme (CIS).

Payment procedure

The Architect/ Contract Administrator and the Employer must follow the strict timetable for the notice and payment procedures:

- The Architect/ Contract Administrator must issue the Interim Certificate within 5 days of the due date.
- The final date for payment by the Employer is 14 days after the due date.
- Should the Employer wish to pay less than the sum stated or withhold or deduct any amount from the certificate (for non-compliance with instructions, liquidated damages or the making of statutory tax deductions) a Pay Less Notice must be issued to the Contractor not later than 5 days before the final date for payment. This must state the sum to be paid and the basis on which that sum has been calculated.
- If no Pay Less Notices are issued by the Employer the certified amount must be paid in full.

Failure to issue certificate

- If an interim certificate is not issued in accordance with the contract, and the Contractor had made an Interim application, the Interim Application shall become an Interim Payment Notice.
- Where the contractor had not made an interim application, they may give a payment notice to the Quantity Surveyor stating the amount considered due and the basis on which the sum has been calculated 5 days after the due date.
- The final date for payment is then postponed by the same number of days as the number of days after expiry of the five days period that the payment notice is given by the Contractor.
- • If the Employer intends to pay less than the sum stated in the Contractor's notice, a Pay Less Notice must be issued by the Employer to the Contractor not later than 5 days before the final date for payment, stating the sum to be paid and the basis on which that sum has been calculated.

NOTE

- The due date is of particular importance under the current regime. Architects/ Contract Administrators should be diligent to issue interim certificates within 5 days of the due date.

Unfixed materials and goods

The interim certificate should include the value of materials that have been delivered to the site but not yet incorporated in the Works unless they are on site prematurely. Under the Sale of Goods Act, a seller is entitled to retain ownership of goods until paid. The Contractor will therefore not be entitled to payment for products not incorporated into the Works, which are subject to reservation of title. Subcontracts and contracts for supply (including contract for supply placed by subcontractors) should expressly provide that property in products shall pass unconditionally to the Contractor not later than their delivery to site. If payment is authorized without making sure the Contractor is able to pass the property in them, an action for negligence could be brought if, in the event of the Contractor's insolvency, the owner of the goods tries to reclaim them.

The contract has the following detailed provision to protect the Employer:

- Unfixed materials and goods that have been delivered to the site and are intended for the Works may not be removed without the written consent of the Architect/ Contract Administrator. Removal would be a breach of contract, and the Employer could therefore claim from the Contractor for any losses suffered through unauthorized removal. This would apply even though the materials or goods have not been included in any certificate.
- Unfixed materials or goods, either on or adjacent to site, that have been included in a certificate that has been paid are to become the property of the Employer, and the Contractor is thereby prevented from disputing ownership.
- Similar conditions regarding non-removal must be included in any subcontracts to protect the Employer.

Off site listed items

If materials or goods or items that are prefabricated for inclusion in the works and stored off site are to be included in an interim certificate prior to their delivery, they must be listed. The Contract Administrator has no discretionary power to certify any off-site items, other than those that have been listed. They may be uniquely identified or not uniquely identified, but the list must be annexed to the contract documents. Certain pre-conditions must be fulfilled:

- the Contractor has provided reasonable proof that the property is vested in them;
- if required (by an entry in the Contract Particulars), the Contractor has provided a bond for uniquely identified listed items;
- the Contractor has provided a bond for listed items not uniquely identified;
- the listed items are in accordance with the contract;
- the listed items are "set apart" or clearly marked and identified;
- the Contractor provides proof that the items are insured against specified perils until delivery to the site.

Off site material and goods

Payment for materials or goods that are not on site can be made by the Employer entering into a separate contract with the Contractor or subcontractor. Where the contract is to be with a subcontractor, agreement of the Contractor must be obtained but cannot be unreasonably withheld. Although the goods or materials are paid for separately and are not included in any interim payments, if payment is directly to a subcontractor the Contractor will be entitled to any discounts.

VAT

As the contract sum is exclusive of VAT, in addition to any sum certified, the Employer will have to pay the amount of any VAT properly chargeable in respect of any payment made under it. Whilst it is good practice to advise the Employer that this additional amount may be due, the Architect/ Contract Administrator is not qualified to make that ascertainment. VAT amounts should be calculated by the Contractor and included on their invoice.

Statement of Retention

Retention

Some of the items that must be included in the gross valuation are subject to retention, of which half is released upon practical completion. The retention percentage is three per cent unless a different rate is inserted in the contract particulars. A retention statement is prepared at the date of each interim certificate by the Architect/ Contract Administrator, or by the Quantity Surveyor if instructed, and issued to the Employer and the Contractor with the interim certificate.

Unless a Local Authority, the Employer is a trustee for the beneficiaries of the retention and may be required to place it in a separate bank account if requested by the Contractor. The Employer is entitled to the benefit of any accrued interest.

Retention bond

Where a retention bond is to be provided by the Contractor (not applicable where the Employer is a Local Authority) no retention will be deducted during the course of the contract. As the amount of retention that would have been deducted from any interim payment must be stated each time the Employer demands payment from the bond, up to date records should be kept.

Non-Completion Certificate

Non-completion

If the completion date has been reached for the Works or a section and the Contractor has failed to complete, the Architect/ Contract Administrator is required to certify the fact. It is important that this certificate be issued in the event of any failure to complete the Works by the completion date, as liquidated damages cannot be claimed if:

- a certificate of failure to complete has not been issued; and
- the Employer has not informed the Contractor in writing that payment or deduction of damages may be required.

Although the contract conditions do not give a time-scale for the issue of the certificate it is suggested that it should be issued immediately after the completion date has passed. If a new completion date is fixed the certificate is cancelled automatically; further certificates can be issued if necessary. Although there is no requirement to state the completion date that the Contractor has failed to achieve, provision has been made for entering this date to avoid any uncertainty.

Where sectional completion applies, a separate certificate should be issued for each section affected.

Liquidated damages

The Employer may deduct liquidated damages from any amounts due under the contract, or reclaim them as a debt, if the following conditions have been met:

- the Contractor has failed to complete by the due date;
- the Architect/ Contract Administrator has issued a certificate of non-completion;
- the Architect/ Contract Administrator has fulfilled all duties with respect to the award of extensions of time ;
- the Employer has given the Contractor written notice before the date of the final certificate that payment will be required or deducted from monies due (as well as a 'Pay Less Notice', a separate notice is required for making the Contractor aware of the terms by which payment or deduction of damages will be made).

Notification has to be given in writing not later than 5 days before the final date for payment of the amount due under an interim or the final certificate. If the Employer wishes to deduct damages from the sum due under the final certificate, the Contractor must be notified of this intention before the date of issue of the final certificate.

The rate must be calculated on the basis of a genuine pre-estimate of the loss likely to be suffered. It should not be out of all proportion to the legitimate commercial interests of making sure that the work is completed on time. If sectional completion applies, there could be a separate rate of damages for each section. Once the rate has been agreed, both parties are bound irrespective of whether the actual loss is significantly less or more then the recoverable sum. If "nil" is inserted, this may preclude the Employer from claiming any damages at all, whereas if the clause is left blank the Employer may be able to claim general damages.