

## General Conditions of Contract for Building Works - Private Edition (with Quantities) 2005 Synopsis.

It has taken all of 10 years' very hard work by the Joint Contracts Committee (JCC) to get the GCC's published. Denis Levett, as Principle Draftsman, has spent untold hours of his own time working through the 6 major drafts and literally dozens of sub-drafts under the pragmatic guidance of the Chairman, Mr LAM Wo Hei, ably assisted by the secretary to the Joint Contracts Committee Mr. William Wang.

It is to replace the JCT 1963 based version, presumably with the blessing of the Provisional Construction Industry Coordination Board (PCICB), which includes the Real Estate Developers Association of Hong Kong.

It commenced life as a localised version of JCT 80 i.e. it included modern day management requirements along with the risk allocation.

It would not be unfair to say that the first three or four drafts reflected the Joint Contract Committee's (JCC) "developercentric" nature, with the Contractor required to jump a number of "conditions precedent" hurdles to get any more time or money.

The first major change came with the publishing of the Tang Report in January 2001. The JCC needed to respond to it as para 5.59 of the Report says -

“..... we recommend that the industry co-ordinating body.....in consultation with concerned stakeholders, lead a review on the Standard Form of Building Contract, Private Edition with a view to achieving the same objectives” - i.e. adopt those recommendations in the Tang Report, together with those made by Jessie B. Grove 111, for Government’s civil engineering contract, in so far as they related to a building contract.

The JCC then set about producing a document that would, as far as practical, express the rights and obligations as between the Employer and the Contractor, in “neutral” and achievable terms. This resulted in nearly all the “conditions precedent” being removed.

In addition, the third and fourth drafts were circulated to a wide range of interested parties in the building industry, their comments and suggestions received and each one answered by Denis Levett.

The second major rethink came when the JCC decided to accept Prof Art McInnes’s advice to modernise not only the content in the light of current law and practice, but also the style of the wording and the presentation.

This resulted in further rounds of consultation with members of the industry, including commissioning Mr. Anthony Houghton to give an opinion on two of the major drafts.

Many of the suggestions were adopted or adapted and are included in the published document. Whilst this put back the publication by 2 years, it has resulted in a document that is better balanced and much easier to read and translate despite its inherent complex nature.

The changes are not revolutionary. The JCC has not tried to follow the NEC by introducing an entirely new contractual language. All the customary words like “direct loss and/or expense” are still included.

It is not an engineering contract e.g. piling would have to be added by a Special Condition of Contract It can also be described as a Contract drafted by practitioners, for practitioners. This of course may provide some interesting debating points for the lawyers.

I need to point out that the HK Construction Association is not a member of the JCC. Its role was “advisory”, through my attendance at the JCC meetings, by the kind invitation of the JCC. My attendance is not to be taken as endorsement of the Contract by HKCA.

The following overview of the main initiatives in the Contract is largely given from the Contractor’s point of view. A detailed Guidance Note is to be published soon.

### General Overview

Caveat. The following is not prepared by a lawyer.

Ultimately, the agreed purpose (inter alia) was to produce a document that is

- (1) as “neutral” as reasonably possible,
- (2) which reflects the current practice and needs of the industry, and
- (3) which satisfies the recommendations of the Tang Report and consequently
- (4) would be endorsed by the PCICB.

As noted, the existing standard form of building contract follows the 1963 British JCT form and has remained unchanged (other than by copious and often confusing special conditions of contract) since first put into use in Hong Kong, getting on for nearly 40 years ago.

Bearing in mind that the new form is a set of General Conditions, it attempts to recognise and deal with the many changes that have happened in the building industry over the years.

It therefore goes into much more detail in describing the rights, obligations and duties of those involved and includes lengthy references to procedures and management requirements that are found in many other forms of contract.

There are very few clauses that the contractors will find problematic. They boil down to the strict conditions precedent notice requirements for additional money (clause 28) and the potential problem for the parties concerning the appointment of a mediator or an

arbitrator (clause 41). The latter is usefully mitigated by the right to go straight to early arbitration for a number of (but not all) important issues. (See the comments at clause 41.)

Both the Architect and the Quantity Surveyor (QS) will have to work harder to meet their respective obligations. They have to respond to the contractually imposed deadlines, in order to protect the Employer's position, (and their own).

### **Points to note.**

There are several pages of Definitions, nearly 70 in all. There is little that is unusual. The most notable are –

“Contract” – which now includes the Specification. The Definition therefore permits changes in risk allocation to be “hidden” in Contract documents other than the Conditions (except the Specification) though to be effective, any change to the Conditions must be flagged as being a Special Condition of Contract.

There is a schedule in clause 5 that sets out the order of importance of the Contract documents. Pre-contract letters, if expressly referred to and included, will be the second most important, after the Articles of Agreement and the Appendix, followed by Special Conditions (if any).

Discrepancies between the Contract documents must be pointed out to the Architect as soon as possible under clause 2.2 or risk loosing out under the new (and most welcome) clause 1.11(1) which requires everyone to act “reasonably and expeditiously”. Everything must be read in the light of this sub-clause, which is likely to have a major (if unpredictable) effect upon the arbitrator’s award.

(Some guidance on the overall effect of sub-clause 1.11(1) on the Contract was given at a Society of Construction Law seminar by Humphrey Lloyd QC, where he likened it to a partnering clause that requires those concerned to act with integrity and in good faith towards each other.)

Given its uncertainty, there may be the temptation to delete clause 1.11(1). Bear in mind that it “cuts both ways” and places the burden on the Contractor as well as the Architect and the QS.

For the Substantial Completion Certificate to be issued, the Works do not have to be 100% finished, just so long as the Employer can make use of the building, but all the necessary inspections and tests must first have been passed.

A “Variation” is defined and is further described in clause 13. It can be ordered at any time up to the issue of the Final Certificate, but if issued after the Certified Date of Completion, BQ rates do not apply.

“Direct loss and/or expense” is a separate calculation from a Variation and is the only matter where a written notice remains a condition precedent to payment. The “Definition” is the common law one and may restrict a claim for consequential damage.

Clause 1.9 requires all communications to be in writing. Some of the very important ones must be by special delivery in order to fix certain critical start dates. (See also clause 39).

There are rather complicated rules dealing with the inevitable oral instructions in clause 4. Basically they must be confirmed in writing before the Contractor should comply with them.

Clause 2 sets out the Contractor’s basic obligations and needs to be read with clause 8, which deals with workmanship etc.

The Works are at the risk of the Contractor until 14 days after the date of Substantial Completion (clause 2.1(1)(g)) when the Employer takes over. There could be a problem with a back-dated completion certificate. The third party and Employees’ Compensation insurance cover extend until the Defects Rectification Certificate (DRC) is issued. (See clause 21).

Under clause 3 the Contractor can be requires to provide a very detailed rolling programme and a method

statement. They are not Contract documents. The Contractor may also have to provide detailed information about site staff. All these requirements can be reduced (by a Special Condition) for simple/smaller Works.

Clause 4 permits the Architect to issue instructions until the issue of the Final Certificate i.e. potentially after the issue of the DRC. The Contractor can go to early arbitration (clause 41.5(1)(b)) over the Architect's power to issue it, but must in any case comply with the instruction.

If the Contractor does work during the contract period, but under protest, and then wins the arbitration, there is no express basis of payment for the work done outside of the terms of the Contract. The arbitrator will not be able to help at the time, because a dispute over valuing such work is not a matter for early arbitration. Any delay to the progress of the Works is covered by clause 25.1(3)(v).

If the Contractor does not "begin" to comply with the instruction within 7 days of its receipt, the Architect can get others to do the work.

What constitutes "begin" is debatable. The Contractor will at least have to send some acknowledgement of the instruction as well as disputing it. If the Architect does get the work done by others, there will be a maintenance liability problem.

The Contractor has to assign warranties (other than NSC/NS direct to the Employer warranties) to the Employer. Before enforcing the terms of any such warranty against the Contractor, the Employer must exhaust all remedies in the warranty (clause 5.11).

The Contractor needs to check the wording of the warranty for the inclusion for the protection offered.

Clause 8 is important. It refers to the standard of workmanship etc. the Contractor needs to achieve. If the Contractor does not reach the standard (to the satisfaction of the Architect i.e. the Architect is the judge ) the Architect can –

- (1) have the work redone by the Contractor, or
- (2) accept the work, at a lower price (as if it were a Variation), or
- (3) to avoid removing satisfactory work with the bad, issue a Variation to remedy it, but with no additional money.

Clause 13 deals with the important issues of Variations, Provisional Quantities and Provisional Sums.

There are few limits placed on the Architect's power to order a Variation, but cannot go so far as to “change the scope or nature” of the Works. (See clause 2.3) Making

an “economic” omission without paying loss of profit is (probably) permitted e.g. omitting a few floors is not allowed; using a cheaper material is.

In any case, the Contractor must not vary the Works without an order in writing. (See clause 4 for oral instructions).

There is nothing unusual about the rules of valuing a Variation, which is done by the QS, without a notice from the Contractor. Generally, the Bill rates apply, or provide the basis for work added or for unchanged work affected by a Variation.

Variations ordered after the date of completion are not subject to Bill rates (clause 13.4(8)). The other exception, work done under protest resulting in early arbitration, has already been mentioned.

The valuing of a Variation does not include anything for “loss and/or expense” or for any other cause that is to be reimbursed under any other clause. Some of these clauses do not require a specific clause 28 notice from the Contractor, including for a Variation, but most do.

Clause 14 ties the Contract Sum to the “quality and quantity” set out in the Bill (and not as shown on the Drawings and/or as described in the Spec.) i.e. any change to an item description or quantity is to be reflected in a change to the Contract Sum.

Clause 17 deals with completion and defects. As noted, the Definition of “completion” in clause 1.6 includes the passing of all tests referred to in the Contract, many of which are likely to be found in the Specification. If they are not clearly referred to in the Bill, the Contractor is entitled to more money (but not more time unless the item is not described in the Contract). Clause 28 notice rules apply.

The Architect can instruct the Contractor to remedy defects at any time during the Defects Liability Period (DLP) but within 14 days of the expiry of (each) DLP, the Architect is to send the Contractor a list of defects to be remedied, which the Contractor has to complete within a reasonable time. If the Contractor does not, the Architect can get others to do it at the Contractor’s expense.

The issue of the DRC for the whole of the Works releases the Contractor from all work related obligations other than for warranties and latent defects.

Any DRC for a Section or Part does not seem to have the same effect. It seems probable that the Contractor can be instructed to do work of repair in such areas at any time up until the final DRC is issued.

Clause 18 describes the Employer’s right to take over a part of the Works early. If done, the DLP starts from the date of handover and the Retention and LD’s are proportionally reduced. There are insurance implications

with the Employer becoming responsible for that part of the Works taken over.

Clause 19 deals with assignments and sub-letting, which is permitted unless expressly prohibited and provided the Contractor does not lose direct control of what is happening on the Site.

The Contractor may be required to submit the sub-contracting arrangements to the Architect, who has the right (within reason) to object to any particular sub-contractor.

Clause 25 sets out the rules covering extensions of time (EoT). There is a very comprehensive list of “events” that entitle the Contractor to an EoT.

The date of the relevant “event”, e.g. the date of issue of a Variation, not when the actual delay to progress occurs, starts the notice time limits running.

Two notices should be sent by the Contractor within specified time limits, but there are no absolute deadlines by which the Contractor is to send the them, other than that the first of them must be sent at some point before the issue of the Final Certificate (and even then, the parties have 28 days to dispute the Architect’s assessment. See clause 32.11).

The Contractor does not have to send the second notice, giving the supporting details, in order to be granted an

EoT, but that will leave the decision entirely up to the Architect, who is almost certain to refuse, pointing to clause 1.11(1), as most likely would an arbitrator.

In any case, the Contractor must “continuously use his best endeavours to prevent or mitigate delay”. This appears to be a condition precedent to getting an EoT, which should be met by the Contractor continuing to work “regularly and diligently” i.e. not contributing to the delay.

In assessing delay during the (extended) contract period, the Architect can take into consideration any contribution by the Contractor to the delay.

In addition, the Architect can also reduce the time for completion for any instructed omission in the work carried out or obligation reduced (i.e. this does not apply to Provisional Sums and Quantities in the Bill), provided the adjustment does not result in a date earlier than the date for completion in the Appendix.

The Architect must give reasons for giving (or not giving) an EoT, within 60 days of receiving the Contractor’s second notice.

Clause 25.2(1)(b) refers to the “predictable length of the delay. Clause 25.3(1) refers to “likely to be delayed “. Taken together, it is clear that, provided the Contractor complies with clause 25, the Architect is bound to consider granting an EoT before or during the delay, but

without the details in the second notice, this will not be possible in all cases.

To get an EoT, there needs to be an actual delay to the completion of the Works (25.3(1)). This implies that the Employer owns the float. This would cause a problem for the Contractor if the Architect sees fit to reduce the amount of time already granted, just before the (extended) date for completion.

The Architect must finally review the EoT's and fix the Completion Date (but not any earlier than the date already fixed) within 90 days of (the date of) Substantial Completion. The Architect cannot reduce the (revised) date for completion after the date of Substantial Completion.

The Contractor can still challenge the Architect's assessment up to 28 days after the issue of the Final Certificate, but without complying with clause 25, would run up against clause 1.11(1).

Clause 26 empowers the Architect to attempt to agree with the Contractor the recovery of any delay for which the Contractor is otherwise entitled to an EoT. This option underlines the need for early delay notices from the Contractor.

The Contractor makes a proposal to meet a specific request from the Architect, for the Architect's agreement. If there is no agreement, the Architect may still instruct

the Contractor to implement the delay recovery proposals (which the Contractor is bound to do). In which case, the Contractor is to hand over the supporting documents to the Architect for the QS to value the proposal based on cost plus 15%.

If the Contractor does not entirely catch up the lost time, the Architect shall grant an EoT for the balance. The EoT notice rules do not apply.

If the Architect does not instruct the delay recovery measures, the Contractor is paid the cost of the wasted effort – so needs to keep records.

Clause 27 sets out the rules governing “direct loss and/or expense” (as defined in clause 1.6).

All such claims must be made in accordance with clause 28, which imposes time limit conditions precedent that must be adhered to by the Contractor, or lose the right. There is no early arbitration for this.

Again, the date of the event, not the actual delay, starts the time limits running.

There must be a written notice of the event, followed by a claim i.e. early warning, followed by the details.

There is a fairly comprehensive list of “qualifying events”. If any occur, or are likely to occur, the Contractor must send a notice to the Architect “within 28

days of it becoming apparent to the Contractor that an event has occurred”.

This is straight forward enough when time runs from e.g. the date of receipt of a suspension notice, but it is much more difficult proposition when the possible delay is caused by late information. The Architect has the problem of deciding when the Contractor should (reasonably) have noticed it might cause a delay. Whilst this problem does not apply to the valuing a Variation, it does to the other parts of the claim.

The Contractor must send the details within 60 days of the date of the 1<sup>st</sup> notice. Where this is not possible, because the effect(s) of the event will not occur until after the 60 days have expired, the Contractor must give a notice to that effect, within the 60 days time limit. There is also a notice mechanism for on-going delays.

The QS has to “ascertain” (i.e. find out for certain) the amount due to the Contractor within 60 days of having the details sent by the Architect. The QS must make the assessment on the information received and include the amount in the next interim payment certificate.

Clause 29 deals with NSC/NS's. The clause does not ban “pay when/if paid” except when the Architect decides, with the agreement of the Contractor, which cannot be unreasonably withheld, to pay off a NSC/NS early. The Contractor can of course still withhold money for any legitimate reason.

If the Architect nominates on different terms than those in the Standard Forms, the Contractor is entitled to a Variation.

The NSC may be nominated in one of two ways – either where the NSC follows the Contractor’s programme, or where the NSC has a specific start and completion dates.

The Contractor can object to any sub-contractor on any tender list. If the Architect still nominates, the Contractor is indemnified against any default by the NSC for the reason of the objection.

The Contractor also has a right of objection to a nomination for reasons covering safety, financial and programming issues and is similarly indemnified against such defaults.

In either case, the clause 28 notice rules apply.

The Contractor is not liable for the NSC’s design work, which is covered by a direct warranty to the Employer. The Contractor needs to check what remedies are included in any warranty before accepting a nomination.

Not including appropriate remedies will likely produce a complaint from the Contractor and if the

Architect/Employer persists, the Employer will be exposed to the protection given by clause 29.2(7).

The Contractor is to notify the Architect if any NSC fails to complete on time. The Architect issues a certificate to that effect if in agreement

The Architect is entitled to pay off a NSC early, provided that the Contractor has an indemnity against latent defects.

If the NSC is terminated for a valid reason, and with the Architect's agreement, which cannot be unreasonably withheld, the Architect must re-nominate (under the same rules) and the Contractor is entitled to any increase brought by the replacement NSC's price and an EoT if the replacement cannot meet the Contractor's programme.

Interim payment certificates are processed in the customary way, with Retention released in two parts, half on completion and half on the issue of the DRC.

The Final Certificate is to be issued "as soon practical" after the issue of the DRC, but it cannot be issued until 28 days after the final account, signed by the QS, has been received by the parties. The Contractor needs to check the final account very quickly, or risk losing out.

The parties have only a further 28 days to dispute any aspect of the Final Certificate which will include any

aspect of the final account. The Final Certificate is then conclusive of all matters not expressly excluded, subject only to latent defects, fraud etc.

If matters that are expressly excluded from the Final Certificate are not subject to “either party taking a further step in the proceedings” within 12 months of the issue of the Final Certificate, the matters are deemed concluded.

Clause 33 refers to the security bond, which is performance not “on demand”.

It must be delivered within 28 days of acceptance of the tender, after which the Employer can withhold from interim payments an amount no greater than the value of the bond until it is.

Clause 41 deals with dispute resolution. There is a limited list of disputes that can be taken directly to early arbitration.

In any case, the Contractor is bound to keep working “regularly and diligently” and respond to all instructions given.

It is a three tier process viz:

- (1) Uninvolved directors try to reach a settlement.
- (2) Mediation.
- (3) Arbitration.

There is a potential problem in getting to arbitration for those disputes not included in the early arbitration list. Mediation must be attempted before moving on to arbitration.

If the appointing bodies (HKIA/HKIS) do not appoint the mediator, the parties cannot move on to arbitration.

If they appoint an unsatisfactory mediator, the chance to settle the dispute by non-confrontational means, whilst work continues, is likely to be lost

The appointing bodies also appoint the arbitrator, without the Contractor having any right to appeal against their selection. Only if they do not appoint within the prescribed time limit, can the parties ask the HKIAC to appoint the arbitrator.

**THE END**