A Personal View of DOM/1, the new 1980 Standard Form of Domestic Sub-contract

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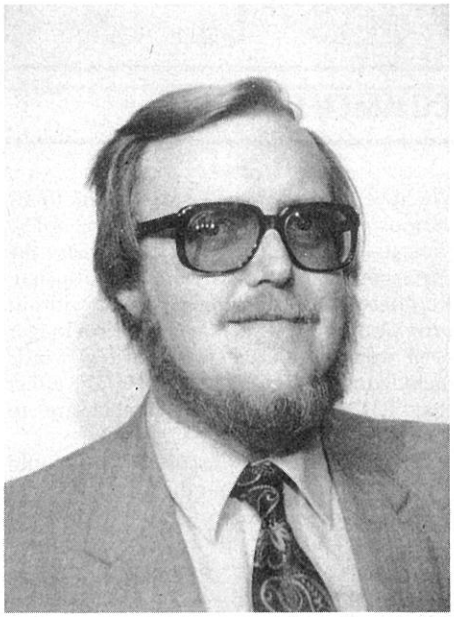

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Finally in May 1981 after a wait of many months for last minute revisions, re-thinking, re-negotiations, etc. etc. the new Standard Form of Sub-contract for Domestic Sub-contractors, 1980 Edition, otherwise known as DOM/1 was released to an expectant Building Industry. The delay appeared to have caught most people by surprise judging by the spate of cancelled conferences on the subject in Winter and Spring 1980/81. The new form was heralded as a radical revision of the Blue Form to which we had become accustomed for some ten years. I was disappointed therefore to discover on reading the new form that far from being a radical revision of the old "Blue Form", it was quite clearly a cosmetic revision to the JCT's own NSC4a, the new nominated sub-contract form. One is left wondering what has taken the approving bodies so long.

To be fair, there are differences between the two forms, some of which I consider to be an improvement, and others not.

The first impression of DOM/1 is that it is in two volumes, running in total to some 62 pages against the 28 pages of the "Blue Form". One can almost see the Architects throwing their arms up in horror at yet another over-complex form of contract; but before they start production of a new intermediate form, let me remind them that DOM/1 is a Form of Contract which will not directly concern them, so they can leave the complexities to the Contractors and Sub-contractors. I am bound to ask the question, is DOM/1 over-complicated? The answer, as with all of the recent JCT 80 documentation is that no it is not over-complicated. It is indeed a manual of good practice, spelling out in plain English (well sometimes), the things that Contractors and Sub-contractors should have been doing for years.

May I return to the comment I made above regarding DOM/1 being in two volumes. This is a definite plus for this document. One volume – the shorter – contains the Articles of Agreement including the arbitration clause, the attestation clauses and the Appendix with all the individual details of the particular sub-contract. The Articles of Agreement will have to be completed for each sub-contract entered into.

The larger volume is the Sub-contract Conditions, which are expressly deemed to be incorporated into the Articles of Agreement, and which do not require to be exchanged for each sub-contract. One copy can be left on the shelf to apply equally to all DOM/1 sub-contracts, only to be taken down in the (unlikely!) event of something going wrong. Affluent contractors can of course exchange copies of the Conditions with every sub-contractor if they so wish.

Before I look at some of the detail of the documents, there is one further general comment which is of considerable importance. The old "Blue Form" was not intended to be used solely with the JCT Standard Form 1963 Edition, indeed it was statedly suitable for use with GC/Works/1, and presumably other sundry Main Contract forms; therefore references to the Architect and the Employer were avoided. This is not so with DOM/1. On the cover of both volumes is a note that DOM/1 is only suitable for use with JCT SF80, in its With and Without Quantities forms. Thus references to the Architect, Employer and specific clauses and sub-clauses in SF80 are very frequent although slightly less than NSC4/4a with respect to the Architect.

It is not possible in the context of a short article to consider each clause in detail, but I give below some personal views on the most important provisions as I see them.

Articles of Agreement

Article 3 is the arbitration agreement, which I am sorry to see makes provision for an Arbitrator to be appointed by the President of the R.I.C.S. after failure of the parties to concur in an appointment. At the risk of incurring the wrath of the venerable Institution, I consider that it is about time the bodies responsible for issuing standard forms of contract, recognised the existence of the Chartered Institute of Arbitrators. An Arbitrator who is elected to a C.I.Arb. panel has undergone the most thorough training and is ideally qualified to embark on an Arbitration, which as recent court cases have shown, can be a minefield, even for the most experienced Arbitrator. My comments of course apply equally to JCT SF 80 where the R.I.B.A. are the appointing body.

Coming to the Attestation clause, may I add a word of warning to any Contractors intending to be prospective parties to a sub-contract. If the main contract is under seal, make sure the sub-contract is also under seal, or potentially you will fall into the 11 years "7 to 12" trap as a client of mine recently discovered to his cost. By that phrase, I mean this: The Limitation Act 1939 basically makes (say) a contractor liable for latent defects for 12 years if the contract is under seal, but only 6 years if the contract is under hand. If the contractor sub-lets to a sub-contractor by a contract under hand when his contract with the Employer is under seal, he will have considerable problems if a latent defect appears in the sub-contract Works during years 7 to 12. The sub-contractor is protected by the Limitation Act, but the Main Contractor is not. The whole matter of limitation has been complicated by "Sparham-Souter" and "Anns v Merton", but the principle remains the same.

Moving further into the Appendix we find in Part 4 Section C the time requirements for the carrying out of the sub-contract works. In my view this is again a considerable improvement on NSC 4a. The date for commencement is stated to be between two dates to be inserted by the parties. Gladly there are exceptions, but generally it is true that building contracts tend to run late. If one date taken from the original programme is inserted in the sub-contract as the commencement date, it is often found that delays have meant that the sub-contractor is not able to start on the stated date. Sub-contractors who are so minded can then make noises to the effect that the Contractor is in breach of sub-contract, time has become at large, and his (the sub-contractor's) only obligation with regard to time is to complete within a reasonable time. DOM/1 has attempted to overcome this problem by giving the opportunity to give two dates. Providing the sub-contractor can start work before the later date there is no question of breach of contract. It will be interesting to see what periods are allowed between these two inserted dates, when sub-contracts are let on DOM/1.

Part 9 of Section C gives the sub-contractor the opportunity to specify the details of

particular items of attendance he requires from the Main Contractor in excess of normal general attendance. I must say, I prefer NSC1 and NSC4a which list specific items of special attendance to be completed by the parties. In a sub-contract which sets out to be detailed in order to avoid confusion, this is a surprising alteration from the NSC series.

Part 12 includes an item which was obviously mistakenly omitted from NSC1 and NSC4a, and that is an opportunity to include a list of basic transport charges for the purposes of fluctuations under Clause 36, the equivalent to 25A on the old Blue Form.

Before I leave the Articles of Agreement, I must draw your attention to the concept of "Numbered Documents" also found in NSC4a. These are all the sub-contract documents with the exception of the form DOM/1 and will mainly comprise bills of quantities, specification and drawings. Intending parties to sub-contracts must therefore ensure that the documents are appended to the Articles of Agreement, are numbered and identified clearly by those numbers in the Appendix.

Before considering certain Conditions in detail, I would like to make some general comments. As in the 1980 JCT Forms the clause numbering is the decimal system using Arabic numbers throughout; for instance, "clause 5.1.2.3". The drafters of DOM/1 have limited the number of levels of numbering to four whereas NSC4/4a goes to five levels. This is obviously an aid to memory and a definite improvement on NSC4/4a. If that item is a plus for DOM/1 the next is a minus. For some reason best known to the drafters, all mention of sub-sub-contractors except in the fluctuations Clause 35.3 has been excluded. The practicalities of the construction industry are that work is sometimes sub-sub-contracted and it seems to me to be sensible to provide for it in the sub-contract conditions as in fact has been done in NSC4/4a.

Conditions

The first clause I propose to consider is Clause 11 relating to the Sub-contractor's obligations as to time, and extensions of time. As in the JCT 80 series of documents, we again have the requirement to notify delays expected to occur in the future. In practice this is an onerous responsibility which is likely to lead to many disputes with the contractor seeking to rely on the fact that he should have been notified earlier, to avoid granting an extension of time. It is clear why the Architect should be advised of a delay expected or likely to occur in the future, because in theory he is then given time to consider implementing variations to recover the time likely to be lost. The same cannot be said of the Contractor. Very rarely is he in a position to order any variation without it first being issued by the Architect to him. On the face of it, it is therefore not so necessary for the Contractor to be advised of delays likely to occur in the future to domestic sub-contract works. The reason for this requirement being included in DOM/1 must presumably be to enable the Contractor, in turn, to notify a likely delay to the Main Contract Works to the Architect.

Clause 11.4.1 states that the Contractor shall, upon receipt of a notice of delay, give an extension of time or his decision thereon not later than 16 weeks from receipt of the notice and back-up information, or the expiry of the period for completion of the sub-contract works, whichever be the earlier. Both in SF80 and NSC4/4a, this period is 12 weeks. Why the difference? Presumably to allow the Main Contractor, having received the sub-contractor's application, to make his own application to the Architect, and having received a decision on that application within 12 weeks, to give his own decision to the sub-contractor. This is all very well before the expiry of the sub-contract period, but if the sub-contractor's application is made within 12 weeks of the expiry of the period for completion, then the additional time allowed to the Contractor to grant an extension of time is of no benefit; he must give a decision to the sub-contractor before he, in turn, receives a decision from the Architect. My own opinion is that 16 weeks is an unduly long time, and given that the equivalent Main Contract period is 12 weeks, the period in DOM/1 should be 13 or at most 14 weeks. . . .

I still feel very uneasy about the requirements in all the 1980 standard forms for a decision to be reached on the application for extensions of time before the completion date or expiry of the sub-contract period as the case may be. It must be totally unfair for any Architect or Contractor to have to give a considered decision almost immediately if they receive a notice just before the Date for Completion. Surely it would have been better to provide for a minimum period of say 4 weeks for a decision to be made, just as a maximum period is imposed. I appreciate there is a period for review of extensions of time previously granted after practical completion, but that is no reason to allow potentially absurd requirements to pass without comment.

In Clause 11.8 we have that old chestnut, the requirement that the sub-contractor shall constantly use his best endeavours to prevent delay. This clause, both in the Main Contract and Sub-contract forms has been a source of argument for years. What does "prevent delay" mean. Does it mean "not allow any further delay to occur", or perhaps "recover the delay that has already occurred". My own view is that it is the former that is meant, but I would like to see the wording altered to make it absolutely clear.

Clause 12.2 also contains a word which is not clear as to its meaning and that is that if the sub-contractor fails to complete on time he shall pay or allow to the Contract a sum "equivalent" to any loss or damage suffered. Equivalent means "of equal value". Surely that is not the intended meaning of the clause. Instead of "equivalent to" it would be far better to have "equal to the amount of".

Clause 13.1 is a clause that has not benefited from its amendment from NSC4/4a. Again it does not make sense. Clause 13.1 incidentally, is the clause that deals with sub-contractor's loss and/or expense. It states "If the regular progress of the Sub-contract Works *is* materially affected . . . and if the Sub-contractor shall within a reasonable time of such material effect becoming apparent" (i.e. we are talking of something in the recent past) "make written application . . ., the amount . . . shall be recoverable. Provided always that the application shall be made as soon as it has become apparent that the progress has been or *is likely to be* affected".

Quite clearly, there is a complete confusion of the past and the future here. The requirement to notify loss and/or expense expected to occur in the future is quite unnecessary, for the following reasons. The Sub-contractor under Clause 11.2 should already have given notice of delay to progress, and therefore the Contractor does not need to be told twice. Loss and/or expense is, in my view, the factual amount of loss and expense that has actually been incurred. The sub-contractor must be required to prove the figures, they are not theoretical allowances. That can only be done by reference to the recent past, not the future.

Clause 13.2 which purports to link up extensions of time and loss and expense is a matter for regret. As has been argued many times by commentators far more eminent than myself, loss and expense and extensions of time are not connected. Extensions of time are to keep alive the damages provisions, and no more. We have all come across the Architect, and Sub-contractors have come across the Contractor who grants an undue proportion of extensions of time for reasons which he thinks will avoid his Client/him paying loss and expense, irrespective of the merits of the case put to him. It is manifestly unfair that a main contractor or a sub-contractor should be prevented from recovering his just dues as loss and expense just because extensions of time have been granted for the wrong reasons. It seems ridiculous that the aggrieved party must go to arbitration to get the extensions of time reviewed before he can obtain his proper recovery of loss and/or expense. If these are the implications of clause 13.2, it would be better if it were deleted. Later on in Clause 13 we have sub-clause 13.4 which is the equivalent provision to 13.1 for main contractors' loss and expense arising from progress being materially affected by default of the sub-contractors. For some strange reason the Contractor has to "*make written application*" to the sub-contractor. This is a strange term; it is difficult to imagine a main contractor making written application to a sub-contractor, just as it would be strange for an Architect or Employer to make written application to a Main Contractor. Surely what is really meant is that the Contractor shall "*give written notice*" to the sub-contractor.

Clause 13.4.3 is just plain bad English. The words "to be made" must be inserted for it to make sense and be grammatically correct. Before leaving Clause 13, I note one other interesting point. When the sub-contractor's loss and expense has been agreed it is stated in 13.1 to be recoverable from the Contractor

as a "debt". Why, I ask, cannot the sum agreed as loss and expense be added to the Sub-contract Sum or included in the calculation of the Ascertained Final Sub-contract Sum, as is the case in NSC4/4a. Parties to contracts tend to sue for "debts" through the Courts, bypassing the Arbitration provisions; I hardly imagine that this is the intention here. You may conclude that I am not very impressed with Clause 13 – you will be right!

The rules for Valuation in Clause 16 contain the usual provisions for work to be paid for on a daywork basis. In the NSC/4/4a forms the daywork sheets have to be delivered —for verification by the end of the week following the week in which the work was carried out. In DOM/1 "end of the week" has been amended to "Thursday". What difference does one day make; it can only lead to confusion for sub-contractors who are involved with both NSC4/4a and DOM/1 sub-contracts. One surprising omission both in clause 16 and 17 is that there is no stated right for the sub-contractor to attend the taking of measurements or remeasurements. Perfectly adequate clauses are included in NSC4/4a and presumably have been consciously omitted from DOM/1. I would expect the sub-contractors' representative bodies to ask for this to be rectified at the earliest opportunity.

Rather inevitably, I suppose, my next comments concern the payment clause, Clause 21. My initial reaction to this clause was one of disappointment that in a domestic sub-contract so closely tied to the Main Form of Contract, opportunity was not taken to tie the payment dates to the dates of Architect's Interim Certificates, as is the case with the nominated sub-contracts. The time for payment has been extended from 14 days to 17 days. The only reason for this is to give the Contractor opportunity to receive his money under the Main Contract before he pays his domestic sub-contractor. So obviously, interim certificates were at the back of the drafters' minds when they made that alteration. Why not grasp the nettle and go the whole way.

A peculiarity of DOM/1 is the different cash discount procedures on amounts due. In NSC4/4a all amounts due to the sub-contractor in interim payments are grossed up by the addition of 1/39th to sums not already inclusive of cash discount. The contractor then being able to deduct 2½% from the whole amount due if he pays on time. Under DOM/1 only the value of work executed (including formula fluctuations) and materials on/off site is subject to cash discount. All other amounts, e.g. loss and expense, traditional fluctuations, etc., are nett, and not subject to discount.

Another surprising omission is a clause establishing that the Contractor's interest in the Sub-contractor's retention is fiduciary as trustee. Clause 21.9 of NSC4/4a covers this admirably, and one is left wondering why it was omitted from DOM/1.

My comment at the beginning about DOM/1 spelling out in plain English what we all should have been doing for years, is well illustrated by Clause 21.7 which was described to me by a lawyer as being an "Idiot's guide to the final account".

Set-off of monies by contractors has been the subject of considerable attention by the Courts and the Industry as a whole for some years. In 1976, new clauses were drafted for use with the Blue and Green Forms which at least gave the sub-contractors some measure of protection. Those clauses drafted in 1976 have been little amended in DOM/1 with the exception that the Contractor now has to give adequate notice of set-off not less than 20 days before the amount from which it will be deducted becomes due and payable. This is an amendment from the 17 days in the Blue Form, and brings DOM/1 into line with NSC4/4a. It is opportune to comment on two practical matters connected with Set-off at this point. The first is to decide when amounts become due and payable to the Sub-contractor. Is it the next monthly anniversary of the date the first interim payment became due, or is it 17 days after that date, being the last day for payment? In my view the answer is made quite clear in Clause 21.2. The amount is payable on the date it becomes due, i.e. the monthly anniversary of the date the first payment became due. The Contractor has up to 17 days to pay the amount that is due, but I cannot agree that the amount is not due and payable until the expiry of the 17 days grace in making payment. After all, there is nothing to stop the Contractor paying on the date the money is due; he does not have to wait 17 days, that is just a maximum period.

Having decided that point, we can look at the practicalities of the set-off procedure. The contractor must give at least 20 days adequate notice before the date when payment is due. He has a maximum of 17 days to pay. Therefore the notice must be given about 37 days before the date payment will actually be made. Assuming payments are made monthly, the previous payment will be made say 30 days earlier than the payment from which it is proposed to set off. Therefore it follows that the notice of intention to set-off will have to be issued some 7 days before the previous payment is made to the sub-contractor. In my experience, Contractors are very slow to appreciate this, and often find the Adjudicator's decision going against them because they have given insufficient notice. The message to contractors is clear; check the dates very carefully before setting off monies against sub-contractors; if necessary, be patient and wait another month.

There is just one comment on Clause 27 which deals with attendance. Why, Oh why do we still have to have imperial measurements for scaffolding. The industry has been metric for over ten years now. If eleven feet is that important, why not say 3.35 metres. Sub-contractors and Contractors have at least some voice in the content of the Standard Method of Measurement which in both 5th and 6th Editions since 1968 has converted eleven feet to 3.50 metres (see SMM5 – U4(b) and SMM6 – T.3.9). May the first revision to DOM/1 speedily remove this anomoly.

My specific comments conclude with the determination clauses 29 and 30, clause 29 determination by Contractor, and clause 30, determination by Sub-contractor. Clause 29 gives some new reasons entitling the Contractor to determine the employment of the sub-contractor. If the sub-contractor either assigns or sub-lets the whole or any part or parts of the Sub-contract Works without written consent, he is liable for determination. Likewise if he fails to pay fair wages. This latter provision should obviously only apply where the Main Contract contains a fair wages clause, i.e. in the Local Authorities edition, although DOM/1 does not make this clear. Until this is amended, sub-contractors should make sure the words "or clause 32" are deleted from clause 29.1.4 if the Main Contract is the Private Edition.

In clause 30, it is interesting to note that there are two remedies available to the Sub-contractor if the Contractor fails to pay him. Either or both can be used. The Sub-contractor is firstly entitled to suspend the Sub-contract Works, and secondly he may be entitled to determine his employment. However, if he suspends execution of the Sub-contract Works, he must be careful to observe clause 30.1.2 which says that he is not entitled to issue a notice of determination for any reason, including reasons other than non-payment, until 10 days after the date of the commencement of the suspension.

Conclusion

DOM/1 is definitely an improvement on the Blue Form. The alterations from NSC4a have brought some improvements, but also some deficiencies. A few well drafted amendments would put these minor deficiencies right. It is lengthy compared with the Blue Form, but it is not complex, or a document solely for lawyers. The average contractor and sub-contractor should be able to understand the provisions without difficulty. I do not think the document is biased in favour of either side. It is obvious looking through the document that the sub-contractors have got their way on some points and the contractors on others. There are two items mentioned above I should like to see included for the benefit of the sub-contractors, but they are not major criticisms.

Now comes the 64000 dollar question – will DOM/1 be used, particularly by the larger contractors who up to now have used their own forms? Being the eternal optimist, I hope this will be the case, but realistically I have my doubts. Any sub-contractor can be sure that the main contractor's own form will give him a lot less rights than he would achieve under DOM/1. Ultimately it is up to the sub-contractors. . . .

If they combine together to insist that DOM/1 is used, they are much more likely to succeed in their objectives. One positive step I should like to see now that domestic sub-contractors have a lot more recognition in SF80 is for it to be made a condition in SF80 that all domestic sub-contracts are entered into on DOM/1. Uniformity on the forms of sub-contract used can only benefit the industry as a whole.

One final point; if you are using DOM/1, don't just refer to it on an official order, complete the Articles of Agreement in full – they only cost £2.00 each.