

New JCT Design/Build Contract – 1981

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In the second part of his article on the new contract, Harold Crowter examines the articles and conditions.

We now continue our consideration of the content and operation of CD81 by a look at the Articles and Conditions, the actual content of the Form of Contract. Clause numbering is the decimal system and follows JCT SF 80. The nearest form to CD 81 is the standard Form Without Quantities 1980, apparently to be referred to as SFXQ. The drafters of CD 81 have followed the individual clause numbering of SF 80 as far as possible. Clauses 1 to 11 are similar to SFXQ; as there is no Clerk of Works, the Variation or Change clause becomes Clause 12 instead of 13 and the numbering follows one number behind until Clause 19. The Fair Wages clause is numbered 19 instead of 19A which brings the numbering back into line again. Clauses 20 to 34 follow SFXQ. As there are no nominated sub-contractors or suppliers the Fluctuation clauses start at 35 which also follow the Without Quantities Form only two numbers behind, finishing at Clause 38 instead of Clause 40.

The form is intended for both private and public sector employers, and care must be taken to make the correct deletions.

As usual the Form commences with Recitals. The First and Second Recitals record the preparation of the Employer's Requirements, the Contractor's Proposals including the Contract Sum, and the Contract Sum Analysis.

The Third Recital is most important, as it states that the Employer has examined the Contractor's Proposals and the Contract Sum Analysis and is satisfied that they appear to meet the Employer's Requirements. In other words, on the face of things, the Contractor has complied in all respects with the Employer's Requirements as far as documentation is concerned. I have mentioned previously the

importance of ensuring that this is in fact the case.

The Fourth Recital deals with the Statutory Tax Deduction Scheme.

We then come to the Articles. Article 1 deals with the Contractor's Obligations to design and construct the Works.

Article 2 gives the Contract Sum, and Article 3 the name of the Employer's Agent. Article 4 records that the Contract Documents, other than the Articles and Conditions have been signed by both parties.

Article 5 provides that disputes will be resolved by Arbitration. The only innovation in this Form is that if the parties cannot concur on the name of an arbitrator then the parties are not bound to go to the President of the RIBA to nominate an arbitrator for them. The Form makes provision in the Appendix for the parties to insert the name of any person they desire to appoint an arbitrator for them. My views on this subject are well known, and it is my hope that the President or Chairman of the Chartered Institute of Arbitrators will be the name most commonly inserted in the Appendix.

The Contract is then signed or sealed after the Articles.

It will be incredibly boring for me to go through the Conditions one by one, certainly in just one article. I therefore propose only to comment on those clauses which differ significantly from the rest of the 1980 series of JCT contracts.

After a list of definitions we come to Clause 2, Contractor's Obligations which obviously differ greatly from the other Forms, as the Contractor is also providing the design. The most interesting part of this Clause is the way discrepancies are dealt with. Firstly the pre-eminence of the Form of Contract is stated; nothing in any of the other documents can override or modify anything in the printed form.

If there are discrepancies in the Employer's Requirements as to the site boundary, the Employer must issue instructions ordering a "Change" which could possibly in turn lead to an extension of time and even loss and expense payments.

If there are other discrepancies within the Employer's Requirements, the Contractor's Proposals shall prevail with no adjustment to the Contract Sum.

However, if there are discrepancies within the Contractor's Proposals the Contractor is obliged to inform the Employer how he proposes to remove the discrepancy. The Employer can then decide between the discrepant items or alternatively may accept the Contractor's proposed amendments. It is entirely the Employer's free choice and whichever way he decides, it will be without cost to the Employer.

There are NO provisions dealing with a discrepancy between the Requirements and

the Proposals.

We now move on to Clause 4. As there is no architect, this Clause is entitled "Employer's Instructions". The Employer's power to issue instructions is considerably more limited than the Architect's power under the traditional contract. The Employer cannot issue any instructions affecting the design of the works without the Contractor's consent, but he is free to give instructions as to quality and quantity providing design is not affected, and the Contractor must comply.

Clause 5 deals with the Custody and Supply of Documents, and the significant change here is an obligation on the Contractor to supply 'as-built' drawings and operation and maintenance manuals at no cost to the Employer. The Employer's Requirements will normally specify exactly what is required.

Clause 6 deals with Statutory Obligations. The main difference here is that the Contractor will often be responsible for obtaining Planning Permission and always Building Regulation approval. This will also involve the Contractor paying the fees chargeable for these operations.

Only in exceptional circumstances will the Employer be liable for additional costs arising from specific additional requirements of the Planning or Building Control Authorities. The exceptions are (i) when the statutory requirement was not in existence at the Date of Tender and (ii) where the Employer's Requirements and Contractor's Proposals make it clear that certain planning requirements were not cleared when the Contract was entered into.

It should also be noted that delay in obtaining Planning Permission, which the Contractor has taken all reasonable steps to avoid or reduce, is a reason giving rise to an Extension of Time *and* (perhaps surprisingly) Loss and Expense.

Clause 7 must rank as the shortest JCT clause of all time—just 9 words. "The Employer shall define the boundaries of the site".

Moving on to Clause 12, which deals with what are in effect variations, but in this form they are known either as "Changes" or "Changes in the Employer's Requirements". I have dealt with this to some extent under Clause 4. The Clause goes on to deal with Instructions as to the expenditure of Provisional Sums, and finally to lay down the rules for valuation of "changes". The rules basically follow SFXQ except that the Contract Sum Analysis is used instead of a Schedule of Rates.

Clause 16 deals with Practical Completion and Defects Liability Period. As there is no architect, the Employer is obliged to give the Contractor a written statement that the Works have reached Practical Completion, which statement shall not be unreasonably delayed or withheld. The date given by the Employer in the statement is binding outside of arbitration. This provision seems somewhat dangerous as it is highly likely that some Employers will put off the issue of a Practical Completion statement for as long as possible as it directly holds the key to liquidated damages.

I would have preferred a situation where the Contractor gave notice of Practical Completion, and that would be conclusive providing the Employer did not dissent from it within say seven days.

The principle of a Defects Liability Period remains unaltered.

Clause 17 deals with Partial Possession by the Employer, the main difference here being that the Contractor is required to submit an itemised estimate of the approximate value of the part taken into possession within 7 days of that event.

This is, of course, for the purposes of retention release. There is no mention in the Practice Notes of a Sectional Completion Supplement being issued, but I would not be surprised to see certain Employers' representatives push for such a supplement in the future.

Clause 18 deals with Assignment and Sub-contracts. This clause moves back to the JCT 1963 provisions, where the Contractor made his own free choice of sub-contractors, providing he could obtain the Architect's/Employer's consent, which was usually a formality.

One new and possibly absurd provision is the necessity for the Contractor to obtain the Employer's consent to the sub-letting of the design work. By the time the Employer is in any position to give or withhold consent, the Contractor will have been long committed to his designer. If an Employer intends to raise objections to any particular architect or designer, it is only reasonable for him to do so before the Contractor engages the designer. The only vehicle for that objection is the Employer's Requirements, but it is difficult to see how the Employer could do so without running the risk of defamation. Providing Employers treat this clause as a rubber stamp and do not raise objections there will be few problems.

Moving on to Clause 24—Damages for Non-Completion. A written notice is still a condition precedent to the deduction of liquidated and ascertained damages (L & A D). That notice however comes from the Employer direct. The requirement is simply this "If the Contractor fails to complete... by the Completion Date, the Employer shall issue a notice in writing to that effect". No opinion or option here, just an obligation to issue a factual notice. The actual deduction of L & A D remains optional.

Clause 25 is the Extension of Time clause. It follows SFXQ fairly closely with obvious amendments relative to the absence of an architect, nominated sub-contractors or suppliers. However, in Clause 25.4.7 we have a new Relevant Event giving rise to an Extension of Time, namely delay in obtaining statutory permissions (obviously aimed at rather more than Planning Permission), and later we have a new clause, 25.4.13 with a further Relevant Event, being a delay caused by a change in Statutory Requirements after the Date of Tender.

Loss and expense in Clause 26 also follows SFXQ closely with the addition of a further reason giving rise to a possible entitlement to a loss and expense payment. This is delay in obtaining Planning Permission. This clause (26.2.2) must be compared closely with 25.4.7 as it is much narrower in its operation than its Clause 25 counterpart.

In Clause 28—Determination by Contractor we have a new and significant event that could give rise to determination. Again our old friend, delay in obtaining Planning Permission. If the carrying out of the Works is suspended after the Date of

Possession for a period named separately in the Appendix, usually two months, then the Contractor may at his option determine his employment.

I am greatly indebted to Mr Richard Fellows of Brunel University and the IQS Contracts Committee for pointing out to me a serious omission in Clause 28. It is this; the reason for determination by the Contractor does not include the insolvency of the Employer. This Clause, of course, only occurs in private editions of SF80 as in law a Local Authority cannot become insolvent.

CD81 is meant for Private and Local Authority use as it comes in only one edition, not separate editions for Private and Local Authority. It is essential that a clause covering the Employer's insolvency is inserted, to be struck out where the Employer is a Local Authority.

It can be argued that the Contractor is protected by the Clause covering failure to honour certificates, but there is a delay involved here which is totally unacceptable to the Contractor.

Two points arise. Firstly, the Form of Contract must be formally amended at the first opportunity on an Addendum slip. Secondly, Contractors must insist in every case, where there is a Private Employer, that a Clause 28.1.3 is inserted immediately after 28.1.2.8 in the precise form a Clause 28.1.4 of SF80 Private Edition.

The Clause with the most radical change is the Payments Clause, Clause 30.

There are two completely distinct methods of making interim payments. Alternative 'A' is stage payments and Alternative 'B' is periodic payments. The method chosen must be recorded in Appendix 2 to the Contract Conditions.

Periodic payments are similar to traditional interim valuations on a Without Quantities Contract, with the exception that an

allowance must be made in each valuation for the design element. It is likely that periodic payments will be made on a monthly basis.

Stage payments are not at pre-determined intervals of time. For instance, the first payment in respect of design work may be payable on signing of the contract, followed by further interim payments at say completion of sub-structures, frame, roof, floor, external envelope, etc.

The cumulative valuation at each stage is pre-determined and inserted in "Appendix".

Both methods of valuation allow for interim adjustments in value arising from "Changes" and fluctuations.

However, the main difference between the two methods concerns unfixed materials on or off site. The stage payment method does not allow inclusion of any amounts in respect of unfixed materials, although the periodic payment method allows for such payments, subject to the usual rules.

In the absence of a quantity surveyor or architect, the Contractor is obliged to make application for Interim Payments. He is obliged to provide such back-up details of his application as are set out in the Employer's Requirements.

The Conditions oblige the Employer to pay the amount requested by the Contractor subject only to a right to notify the Contractor if he considers that the amount requested by the Contractor is not in accordance with the Contract. If the Contractor fails to agree to the Employer's proposed adjustment, the Employer is nevertheless obligated to pay what he considers the Contractor should have requested. The Contractor's acceptance of such a payment is not a waiver of his right to be paid what he had originally requested.

Immediate arbitration is possible should there be any dispute on this point.

Most amounts included in interim payments are subject to retention. The



Huntavia House—new headquarters and avionics equipment laboratory complex of Field Aviation Limited and Fieldtech Heathrow Limited.

The building was designed and constructed by IDC Limited, of Stratford-upon-Avon, and opened by HRH The Prince Philip on 14 December 1981.

retention is stated to be trust money and with the exception of Local Authorities, the Employer must set it aside in a separate trust account.

The Contractor must prepare the Final Account and submit it to the Employer together with a Final Statement of monies due within 3 months of Practical Completion. This presumably infers that Contractors are twice as quick at producing final accounts as quantity surveyors!

The Employer then has approximately 4 months to dispute the Final Account and the Final Statement after which, in the absence of an employer's objection, they become binding and conclusive.

If only such a method could be devised to expedite traditional final accounts!

When conclusive as to the balance due, the Final Account and Final Statement are also conclusive that a requirement that materials and workmanship are to be to the reasonable satisfaction of the Employer, has been fully met.

The Conditions conclude with the Fluctuations clauses which, as the other SF80 Contracts, pre-suppose that there will always be tax fluctuations, unless the other alternatives, ie. Clause 37 (labour and materials cost and tax fluctuations) or Clause 38 (formula adjustment) have been adopted.

The main difference with the other SF80 Contracts is that the fluctuations clauses are bound in the main document, not in a separate supplement.

The only fluctuations clause worthy of further comment is the formula adjustment Clause 38. The absence of an annotated Bills of Quantities showing the individual work categories or work groups presents obvious problems. That is why the content of the Contract Sum Analysis, referred to in my previous article, is so important. Every item in the Analysis must be allocated to a work category or work group, if possible. Where an item in the Analysis covers more than one category or group, the most significant category or group must be chosen to represent the whole item. If stage interim payments are chosen, each stage must be broken down in this way.

Design work is stated to be not subject to formula adjustment and must therefore be separated out, whether periodic or stage payments are chosen.

One problem that does occur with the stage payment system is the circumstance where a stage takes a few months to complete. The Formula Rules dictate that the index to be used is that of the mid-point of the valuation period. Providing the value of the work in the first half of the period is roughly the same as that in the latter half, no great inaccuracy in the calculation of fluctuations results, but where the value is largely at the end or largely at the beginning of a period of a stage, the formula will give an inaccurate result.

If the parties can accept this, then that is fine, but the Practice Note recognises this problem and suggests that parties may like to consider making each stage a separate Work Group to avoid this problem.

Formula fluctuations, as with all other fluctuations under this form are to be calculated by the Contractor and submitted to the Employer for checking together with all such back-up information as the Employer may reasonably request.

Following the Conditions are the Appendices.

Appendix 1 largely follows the Appendix in the other SF80 forms, with some differences, most of which I have referred to above.

Appendix 2 sets out the alternatives for the methods of payment referred to in discussion of Clause 30.

Appendix 3 allows the parties to list all the documents forming the other three Contract Documents, namely Employer's Requirements, Contractor's Proposals and Contract Sum Analysis.

This presupposes that often the original document will be modified by letters or addendum sheets during agreement of the Contract Documents. The additional documents as well as the original will be individually identified in Appendix 3.

The Document concludes with the VAT Agreement in the form of Supplemental Provisions.

For those of you who have managed to retain your concentration and come to the end of this article, you will obviously have formed your own opinion of the contract's content and usefulness.

My view is that on the whole, JCT are to be congratulated. They have produced a form with complex provisions, but they have succeeded in keeping it shorter than most of the other standard forms. For instance, the Private with Quantities Form is 59 pages plus a Fluctuations Supplement of 31 pages making 90 pages in all. The Form with Contractor's Design is complete in 56 pages, including fluctuations. This is a significant improvement and shows that JCT have taken criticisms of excessive length of their documents seriously.

With all due respect to the various contractors producing their own forms, and to the NFBTE, I must say that this is the best Design and Build Contract I have seen. That is not to say it is perfect. No doubt it will require a little fine tuning after it has been in use for a while, but it is workable and I hope it will find acceptance with Employers and Contractors alike and also with the professionals advising prospective Employers.

My main reservation on first reading the document was the lack of provision for the very common practice among Contractors of putting a long list of Assumptions and Exclusions in their Offer and Proposals. It is foolish to pretend that Contractors will not insert such clauses in their proposals where this Form is used.

I had first hand experience of the wisdom of doing just that a few years ago. The Contractor, for whom I was working at the time, submitted successful proposals for a factory extension in a North Midlands city. The city is well known for its past mining activity, but a search at the National Coal Board revealed nothing under this site, but of course there was always the risk of unknown and uncharted 19th century mine workings anywhere in the vicinity. In our proposals we therefore excluded all liability for, and any additional costs in connection with, discovery of old mineral workings under or in the vicinity of the site. The Employer had not told us to make that condition, it was our commercial good sense that told us to include it. Piling duly started on the site and drilling for the 67th pile out of 70 revealed an uncharted mine shaft. I need not continue

with the story other than to say that the results were very expensive for the Employer. The Contractor's pre-tender wisdom had safeguarded his position.

How then are the problems associated with this practice going to be resolved? The answer must be this. If the Employer accepts the assumptions and exclusions in the Contractor's Proposals he will append a list of these assumptions and exclusions to his Employer's Requirements, and at the same time alter any other provision in the Requirements that is in conflict. There will then be no discrepancy between the Employer's Requirements and the Contractor's Proposals, and should those assumptions or exclusions prove to be unfounded, that will be a "Change in the Employer's Requirements" as defined in Clause 12.

In my view the Practice Notes should have commented on this practice which is too common to be ignored and does present a potential problem.

Overall the Practice Notes are well prepared and essential reading for anyone proposing to use the Form CD81.

I, for one, will recommend the use of this Form to my clients.

As I have said above, CD 81 is for use where the Employer or his architect have no design input, but if the design input is mixed, ie. part Contractor, part Employer/Architect then CD 81 cannot be used. We then have to use the new Contractor's Designed Portion Supplement (1981), on which I shall perhaps comment on another occasion.

REVIEW OF VAT REGISTRATION AND DEREGISTRATION

HM Customs and Excise have published a report outlining proposals for changes in VAT registration and deregistration. The review is one of the projects undertaken by the Department under the direction of Sir Derek Rayner.

The first part of the report proposes a number of changes in VAT registration and deregistration procedures and these will be considered for implementation fully or partially. The second proposes the compulsory deregistration of VAT registered traders with business turnovers below a minimum limit.

The Government believes that compulsory deregistration could have an adverse effect on small businesses which would be contrary to its policy of encouraging their growth. It has concluded that the disadvantages to the trading community of compulsory deregistration outweigh the advantages of the economies in the public sector and have, therefore, decided not to proceed with these recommendations.

Copies of the report are available on request from the Customs and Excise Library, Room 428, Kings Beam House, Mark Lane, London EC3R 7HE. A charge of £5 per copy will be made to cover costs and postal applications should include the appropriate remittance made payable to Customs and Excise.